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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

OPPOSERS' FOURTH NOTICE OF RELIANCE

Pursuant to Rule 2.120(j)(1) of the Trademark Rules of Practice and Section 704.09 of the Trademark Trial and Appeal Board Manual of Procedure, Opposers, ProMark Brands Inc. and H. J. Heinz Company, hereby submit, make of record in connection with this opposition proceeding, and notify Applicant of Opposers' reliance upon the December 18, 2012 discovery deposition and accompanying exhibits of Philip Johnson, who testified as an expert witness on behalf of Applicant GFA Brands, Inc.

A true and correct copy of the discovery deposition is attached hereto as Exhibit F, and a true and correct copy of the accompanying exhibits are attached collectively hereto as Exhibit G.

Dated this 12th day of March, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by FedEx Express mail, postage prepaid, on this 12th day of March, 2013, to Counsel for Applicant:

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EXHIBIT F

PHILIP JOHNSON
IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD

PROMARK BRANDS, INC., and)
H.J. HEINZ COMPANY,)
Opposers,)Opposition
vs.)No.
GFA BRANDS, INC.,)91194974
Applicant.)91196358

DEPOSITION OF PHILIP JOHNSON
December 18, 2012
Chicago, Illinois

Reported By:
TRICIA J. FLASKA, CSR, RPR
JOB NO. 56589

1 PHILIP JOHNSON

2
3 Tuesday, December 18, 2012

4 9:17 a.m.

5
6 DEPOSITION OF PHILIP JOHNSON, held at the
7 offices of Jones Day, 77 West Wacker, Chicago,
8 Illinois, before Tricia J. Flaska, CSR, RPR.
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PHILIP JOHNSON

A P P E A R A N C E S:

JONES DAY

BY: KEVIN C. MEACHAM, ESQ.

ANGELA R. GOTT, ESQ.

500 Grant Street

Pittsburgh, Pennsylvania 15219

APPEARING FOR THE OPPOSER.

QUARLES & BRADY

BY: DAVID R. CROSS, ESQ.

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APPEARING FOR THE APPLICANT:

PHILIP JOHNSON

I N D E X

WITNESSES

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PHILIP JOHNSON for Opposer	
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EXHIBITS

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Exhibit 2	A Study of Likelihood of Confusion report	19

1 PHILIP JOHNSON

2 PHILIP JOHNSON,

3 of lawful age, produced, sworn and examined on
4 behalf of the Defendants, deposes and says:

5 EXAMINATION

6 BY MR. MEACHAM:

7 Q Mr. Johnson, my name is Kevin Meacham. We
8 met off the record. I represent Heinz in these
9 proceedings along with my colleague, Angela Gott,
10 and can you please state your name for the record?

11 A My name is Philip, P H-I-L-I-P, Johnson,
12 J-O-H-N-S-O-N.

13 Q And, Mr. Johnson, you have been deposed
14 before, correct?

15 A Yes, I have.

16 Q And you've testified at trial, correct?

17 A Yes, I have.

18 Q And you understand that you're under oath,
19 correct?

20 A I do.

21 Q Okay. Any reason you should unable to give
22 inaccurate -- or accurate and truthful testimony
23 today?

24 A No, there is not.

25 Q Okay.

1 PHILIP JOHNSON

2 (Exhibit 1 marked for identification.)

3 BY MR. MEACHAM:

4 Q Mr. Johnson, you've being handed your
5 Notice of Deposition in this case. Have you seen
6 this document?

7 A Yes, I have.

8 Q Okay. And can you briefly summarize your
9 education, educational background?

10 A Sure. I have an undergraduate degree in
11 psychology from Loyola University here in Chicago
12 and a graduate degree from the University of
13 Chicago, an MBA.

14 Q And any other education?

15 A No.

16 Q And you are the same Philip Johnson that
17 generated the report ProMark Brands, Inc. versus GFA
18 Brands, Inc., A Study of Likelihood of Confusion?

19 A I wrote such a report.

20 Q Okay. Mr. Johnson, what did you did do
21 today to prepare for your deposition?

22 A I reread my report. I looked a report from
23 Sabol, I believe it is and critique of that report
24 from -- I'm blanking on his name.

25 MR. CROSS: Leon Kaplan.

PHILIP JOHNSON

A Yes.

BY MR. MEACHAM:

Q So you reviewed a report by Dr. Sabel?

A I don't remember if he was a doctor, but it was a S-O-B-E-L(s.i.c.), I think was his name. As best I recall.

Q And a criticism by?

A Leon Kaplan.

Q Okay. And who provided you with those documents?

A Counsel.

Q Okay. And why did you review the report by Dr. Sabel?

A Well, that's kind of where this whole assignment started.

Q Can you explain that?

A When I was originally contacted by counsel, I was provided with that report.

Q Okay. And who contacted you to serve as an expert in this matter?

A Mr. Cross.

Q Okay. And -- were you first contacted?

A I believe it's in my report. Sometime early this year.

PHILIP JOHNSON

Q Early 2012?

A I believe that's the case.

Q And were you retained immediately?

A I don't recall.

Q And what -- do you remember when you were retained?

A I'd have to look at the retention agreement.

Q Okay. Have you ever been an expert for counsel representing GFA brands before?

A No, I have not.

Q Have you ever worked with Mr. Cross before?

A I don't believe so.

Q Okay. So what did you do in preparation for providing your expert report?

A I think I already answered that.

Q For your expert report, not your deposition.

A I'm sorry. Could you repeat the question?

Q What did you do in preparing to provide your expert report in this case?

A I reviewed the survey from Heinz. I talked with counsel. I viewed the Complaint.

Q Okay. Anything else?

1 PHILIP JOHNSON

2 A I looked at the products -- or the product
3 online and in the grocery store. At least the Heinz
4 products.

5 Q The Smart Ones product?

6 A The Weight Watchers product, which I
7 believe most of them, but I don't think all of them,
8 said Smart Ones. But I don't recall.

9 Q Okay. Do you recall what types of products
10 you looked at? Did you look at frozen food meals?

11 A Among other things, yes.

12 Q What other things did you look at?

13 A Well, I looked at other packaged products
14 and refrigerated products and other products in the
15 grocery store.

16 Q Can you recall what other products those
17 were?

18 A No.

19 Q Did you review any other documents
20 preparing for your expert report?

21 A I don't recall any.

22 Q And you said you reviewed the Complaint.
23 Did you review any other pleadings?

24 A I'm sure I did.

25 Q Okay. Do you have any idea what pleadings

PHILIP JOHNSON

those were?

A Not offhand.

Q Were those provided to you by counsel as well?

A Yes, they were.

Q And when you were contacted by counsel, what were you asked to do?

A I was asked if I could do a proper survey in response to the Sabol, or Sobel(s.i.c.), Survey that had been submitted in this matter.

Q And you said "proper survey in response." Why did you use the word "proper"?

A I'm sorry. That's probably my term, not what I was asked to do. Typically when you do a rebuttal survey, you take the survey that was submitted by the other side and you usually change one or maybe two things in it that are what we would call the fatal flaws and then repeat it, and that's typically a rebuttal survey.

When you have a survey like the one submitted here by Sabol, or Sabel, there was nothing that I could do with it in terms of being a pure rebuttal survey. We used that as a basis, so I had to start from scratch with what I consider to be a

1 PHILIP JOHNSON

2 true likelihood of confusion study in this matter.

3 Q Do you remember what was wrong with Dr.
4 Sabel's survey?

5 A As I recall, almost everything.

6 Q Do you recall anything specific?

7 A The universe that he included in the
8 survey, the questions he asked, the analysis he did,
9 and the conclusions he reached.

10 Q Okay. And what was wrong with the
11 universe?

12 A He excluded people who hadn't heard of his
13 client's products.

14 Q Anything else?

15 A I don't recall.

16 Q Okay. And you said the universe -- what
17 were the other criticisms that you had?

18 A Well, there are a lot of things wrong with
19 it.

20 Q But you don't recall all of them?

21 A I don't recall everything that's wrong with
22 it.

23 Q Okay. Okay. Have you done rebuttals
24 frequently in your career?

25 MR. CROSS: Objection to form?

PHILIP JOHNSON

A I've done them.

BY MR. MEACHAM:

Q You've done rebuttal reports?

A I have.

Q Okay. And typically, what do you do when you do a rebuttal report?

A Well, as I was saying, usually you do an analysis of the other person's survey and identify the fatal flaws, recreate that survey without the fatal flaw.

Q Okay. So you identify -- do you always create an additional survey when you provide a rebuttal report?

A Almost always.

Q Would you say that of the times you've been asked to provide a rebuttal report, would you say the majority of the time that you've done an independent survey as well?

A I'd say at least three out of four times.

Q So 75 percent of the times that you provide rebuttal expert report, you produce an independent survey?

A I believe that is correct.

Q Okay. So then 25 percent of the time, or

1 PHILIP JOHNSON

2 approximately thereof, 25 percent of the time you
3 agree that you do not provide an independent survey?

4 A Not sure what that means.

5 Q 25 percent of the time that you're asked to
6 do a rebuttal report you do not provide an
7 independent survey? You just provide a report that
8 criticizes the survey that was submitted by the
9 opponent?

10 A Well, that's's been my experience.

11 Q Okay. And so you said that you reviewed --
12 to prepare for your report you reviewed Dr. Sabel's
13 study design.

14 Were you ever instructed on how to design
15 your survey?

16 A No.

17 Q Did you base your design in whole or in
18 part on Dr. Sabel's survey?

19 A As I said, in this particular case, no.

20 Q And you said you reviewed Dr. Kaplan's
21 expert report, correct?

22 A I did.

23 Q Do you recall when you reviewed it?

24 A No, I do not.

25 Q Did you review it before or after you

PHILIP JOHNSON

designed your survey?

A I don't know.

Q You can't recall?

A I can't recall.

Q When you were first contacted by counsel,
were you provided with Dr. Kaplan's report?

A No.

Q Okay. After you were retained, were you
provided with Dr. Kaplan's report?

A It was some time afterwards.

Q Okay. So you can't recall sitting here
today whether you were provided with Dr. Kaplan's
report before or after you designed your survey?

A If I could see the date on his report, it
might help. Let me put it this way, I didn't use
his survey to create my report, or to -- I didn't
use his report to create my survey.

Q So you didn't base your design in whole or
in part on Dr. Kaplan's report?

A That's correct. That's what I'm trying to
say.

Q But you don't know if you reviewed it or
not prior?

A That's the issue. Yes.

PHILIP JOHNSON

Q How much time did you spend preparing your report?

A I don't remember.

Q Like a week?

A I don't remember.

Q Couple days?

A Don't remember.

Q You don't recall. Do you recall how much you were paid to produce your report?

A Not as we set here. But it's in my report.

Q Does \$100,000 sound about correct?

A That's fairly typical for something like this.

Q Is \$100,000 the typical cost for survey in a case like this?

MR. CROSS: Objection to form.

A It's a pretty typical cost for doing a likelihood of confusion survey in a case like this.

BY MR. MEACHAM:

Q And in the range of surveys that you've produced or you've designed, was this more expensive than a typical report?

A No.

Q So you'd say the average is about \$100,000?

PHILIP JOHNSON

A I'd say that's a pretty good average, yes.

Q What goes into these costs?

A It's the cost of the professional time to design the survey, construct the study, arrange for it to be conducted, conduct the fieldwork, do the analysis, write the report.

Q You're being paid separately for your time here today, correct?

A For the time here, yes.

Q And have you discussed your report with anyone other than Mr. Cross?

A No, I haven't.

Q You didn't discuss it with any coworkers?

A No.

Q Okay. Have you discussed your report with Dr. Kaplan?

A No, I have not.

Q Okay. Have you ever talked to Dr. Kaplan?

A I have met him, but not in this matter.

Q Not for this matter?

A Correct.

Q You met him at professional association --

A I don't remember.

Q But you have met him?

1 PHILIP JOHNSON

2 A At least by phone, if not in person. I'm
3 familiar with him. I've spoken with him. Let me
4 put it that way. Whether it was in person or not, I
5 don't recall.

6 Q But you did not talk with him in connection
7 with this matter?

8 A No, I did not.

9 Q And you didn't talk about your report with
10 him?

11 A I didn't talk to him at all in connection
12 with this matter.

13 Q Okay. Have you reviewed any deposition
14 transcripts in this case?

15 A I don't recall.

16 Q Do you recall reviewing Dr. Kaplan's
17 deposition transcript?

18 A I did not.

19 Q And you don't remember if you reviewed any
20 other deposition transcripts?

21 A Unless it was something that was referred
22 to in the general Complaint or the pleadings or
23 interrogatories at the time, nothing comes to mind.

24 Q You said "interrogatories." Have you
25 viewed any interrogatories in connection with this

PHILIP JOHNSON

case?

A I don't know. I don't recall any. I'm just saying it's one of the things you sometimes review.

Q Has anyone other than you performed any work to produce this report?

MR. CROSS: Objection to form.

BY MR. MEACHAM:

Q To produce your report, I should say.

A Well, I wrote the report, if that's what you mean.

Q Did other persons within your company work on the report?

A I'm not sure what you mean by that.

Q You didn't take the survey, did you -- or you didn't administer the survey, did you?

A I did not administer the survey. Interviewers administer the surveys.

Q And are the interviewers employed by your company?

A No, they're not.

Q Okay. Who are they employed by?

A They're subcontractors that work for the mall interviewing services that actually perform the

PHILIP JOHNSON

interviews.

Q Do you know the name of the service that you used?

A Well, it would have been services. Each mall has its own service. Sometimes it's a chain where more than one mall would have the same owner, but most of the time they're independent of one another.

(Exhibit 2 marked for identification.)

BY MR. MEACHAM:

Q Mr. Johnson, I'm handing you what has been titled ProMark Brands, Inc. versus GFA Brands, Inc., A Study of Likelihood of Confusion. Can you take a minute and review that, please.

A This is a copy of the report that I prepared in this matter.

Q Okay. Mr. Johnson, in your words, can you tell me what is a brand?

A Well, a brand is typically the name or the persona or the appearance or at times simply a logo or mark or even a color that identifies a particular source -- usually a particular product from a particular source.

Q So it can be a name?

PHILIP JOHNSON

A It can be.

Q And it can be something else, correct?

A Yes.

Q So it could be a symbol?

A A logo, yes.

Q A package?

A A package.

Q And does it have to be unique?

MR. CROSS: Objection to form.

A Not sure what you mean by "unique."

BY MR. MEACHAM:

Q I mean, does a brand have to be unique?

A Well, it has to identify a single source.

Q Okay. And in your words, can you tell me what the term "brand strength" means?

A Generally brand strength is used to determine the level of brand recognition.

Q And how do you measure brand strength?

A Well, it depends. Brand strength includes a lot of different elements depending on what you mean and how you're going to use it.

For example, it's not typically simply awareness. It has to do with the value that a consumer attaches to something. So awareness is a

1 PHILIP JOHNSON

2 component, but it's not the component.

3 Q Okay. So awareness --

4 A Desirability, accessibility, affordability,
5 experience, other people's experience, and there are
6 a number of other metrics.

7 Q So there's a variety of different ways you
8 can measure brand strength; is that correct?

9 A Many different ways, yeah.

10 Q Okay. And would you agree that a question
11 regarding a consumer's evaluation of a brand is a
12 subjective question?

13 MR. CROSS: Objection to form.

14 A I don't understand the question.

15 BY MR. MEACHAM:

16 Q Would you agree that, you know, the measure
17 of a brand strength, asking a consumer about the
18 strength of a brand, is a subjective question?

19 MR. CROSS: Same objection.

20 A I don't think of measures of brand strength
21 as subjective.

22 BY MR. MEACHAM:

23 Q Would you agree that a question to a
24 consumer about the strength of a brand is a
25 subjective question?

1 PHILIP JOHNSON

2 MR. CROSS: Objection to form.

3 A Again, I don't know why it would be a
4 subjective because -- and you can ask an objective
5 question.

6 BY MR. MEACHAM:

7 Q But generally, if you just asked an open
8 ended question, would that be a subjective question?

9 MR. CROSS: Objection to form.

10 A No, the fact that it's an open ended
11 doesn't make it subjective.

12 BY MR. MEACHAM:

13 Q Would you agree that the consumer's
14 response to a brand is based on that consumer's
15 knowledge of the marketplace?

16 MR. CROSS: Objection to form.

17 A It's not based on it. It's possibly a
18 component of it or it's a factor, but it's certainly
19 not based on it, no.

20 BY MR. MEACHAM:

21 Q So you would agree that it's a component?

22 A Consumer's knowledge of the market?

23 Q Yeah.

24 A It can influence it.

25 Q Okay. What else drives the consumer's

PHILIP JOHNSON

perception of a brand?

A Well, I think I already listed a number of things. There are literally dozens, if not hundreds, if not thousands of things that drive it.

Q And you mentioned a few of them: Awareness desirability, accessibility, experience. Are there any other --

A Affordability.

Q Are there any other important ones that you think you left out?

A Oh, I don't know. I really wasn't prepared to teach a class on this in the deposition itself.

Q Well, who better to learn from?

A Well, I'm not prepared to do that at this point.

Q Would you agree that perception of a brand can be knowledge stored in the mind of a consumer?

MR. CROSS: Objection to form.

A I don't think I would agree with that, no.

BY MR. MEACHAM:

Q So you don't believe consumers have knowledge regarding brands that are unlocked by the marketplace?

MR. CROSS: Objection to form.

PHILIP JOHNSON

A I don't think that's what you're asking me.

BY MR. MEACHAM:

Q Would you agree that perception of a brand can be knowledge stored in the mind of a consumer?

MR. CROSS: Objection to form.

A Well, I guess I don't understand when you say "can be knowledge stored."

BY MR. MEACHAM:

Q Is it possible?

A I don't know what that means.

Q You don't know what "can be" means?

A No. "Can be knowledge"? What do you mean by "knowledge stored in the mind" --

Q That it's knowledge about a brand that's stored in this consumer's mind.

MR. CROSS: Objection to form.

A Well, knowledge of a brand stored in a consumer mind is certainly a component of perception, but it isn't perception per se.

BY MR. MEACHAM:

Q Okay. And are there certain things that can trigger that knowledge, cause it to come to the forefront of a consumer's mind?

A Well, knowledge is something that can be

PHILIP JOHNSON

triggered, if that's what you're asking.

Q So knowledge of a brand can be triggered?

A Well, knowledge of a brand can be retrieved and retrieval is usually caused by a trigger.

Q Okay. And what can be -- and these triggers can be external, correct?

A Can be external or internal.

Q Such as the design of a logo?

A Can be anything.

Q Type of packaging?

A Unlimited.

Q Unlimited. Placement on a store shelf?

A Could be anything.

Q Interaction with comparable items?

MR. CROSS: Objection to form.

A It could be anything.

BY MR. MEACHAM:

Q Could it be a wordmark?

A As I said, it could be anything.

Q Okay. Mr. Johnson, in the past 12 months approximately how many surveys have you conducted?

A Dozens of different surveys.

Q Dozens. So two dozen, three dozen?

A Somewhere in that neighborhood.

1 PHILIP JOHNSON

2 Q Do you care to estimate how much surveys
3 you have a conducted in the past 12 months?

4 A I'm sorry. That's what I just tried to do.

5 Q You said "dozens." Can you get any more
6 specific than that?

7 A Well, for each survey is composed of
8 surveys, so each survey you design and conduct. So
9 when I'm saying two to three dozens, I'm talking
10 about designs or individual questionnaires, survey
11 protocols. Then each survey is done with hundreds
12 or even thousands of people.

13 Q Okay. I'm more concerned with the survey
14 designs.

15 A I said two to three dozen is probably a
16 reasonable estimate. I never really thought about
17 it.

18 Q And about how many of those were to measure
19 the likelihood of confusion?

20 MR. CROSS: Objection to form.

21 A Maybe a dozen.

22 BY MR. MEACHAM:

23 Q What were the others?

24 A Well, they're trade dress surveys,
25 secondary meaning surveys, if you will, genericness

1 PHILIP JOHNSON

2 surveys, false advertising surveys, advertising
3 surveys, consumer tracking surveys, awareness and
4 usage surveys.

5 Q Approximately, of those two to three dozen,
6 how many were related to litigation?

7 A Probably two dozen.

8 Q So approximately two-thirds of the surveys
9 you've done?

10 A At least in terms of designs, yes. Not the
11 quantity. But different designs.

12 Q Okay. In connection with the likelihood of
13 confusion surveys that you've conducted, have you
14 used different methodologies?

15 A Yes.

16 Q And can you describe some of those
17 methodologies for me?

18 A Mall intercept surveys.

19 Q Just briefly, what's -- a mall intercept
20 survey is?

21 A It's a survey where -- they're conducted in
22 shopping malls around the country where shoppers are
23 screened to qualify for participation in the survey
24 and then they're questioned within the facility in
25 the mall.

1 PHILIP JOHNSON

2 Q Does a mall intercept -- the fact that the
3 person who's part of the survey has to be at the
4 mall, does that in any way pre-screen the survey
5 results?

6 A I don't understand the question.

7 Q Does the fact that you conduct the mall
8 intercept survey at a mall, does that limit the
9 population of people that you can have?

10 A Well, it's the population that you're
11 drawing from is the population that can be reached
12 at the mall. It's a form of -- once upon a time it
13 was like a village square idea that the shopping
14 mall today is the village green of the past, so you
15 acquire the population that's available there.

16 Q Okay. What other types of surveys have you
17 conducted?

18 A Telephone surveys. Internet surveys.

19 Q Have you conducted regular mail surveys?

20 A What's a "regular mail survey"?

21 Q Like snail mail?

22 A We don't do surveys by snail mail.

23 Q How do you determine what form of survey to
24 use in a given circumstance or a given case?

25 A Depends what you're trying to find out.

1 PHILIP JOHNSON

2 Q Okay. What factors would you consider?

3 A Well, typically, if you're going to show
4 something to people, you don't generally use a
5 telephone survey unless it's very simple and you can
6 do it via the phone, but if you have to show them
7 something, usually you can't.

8 Q So if you have to show something, you would
9 generally use a mall intercept survey?

10 A Generally. Sometimes you'll use the
11 Internet where you can also show people something,
12 but when you do that, it's generally when the normal
13 way they encounter it is via the Internet, you
14 prefer to do an Internet survey.

15 Q Now, if it's just a wordmark, can it be
16 possible to use a telephone survey?

17 A Yes, it can be.

18 Q What else do you consider when you are
19 designing a survey?

20 A Well, how many you're going to do, where
21 you need to do them, who you need to reach, how hard
22 is it to find them in the population.

23 Q And are those factors you just listed, are
24 those for confusion of -- likelihood of confusion
25 survey as opposed to other surveys?

1 PHILIP JOHNSON

2 A No. It's really for any survey.

3 Q What's the purpose of conducting a
4 likelihood of confusion survey?

5 A To determine whether there's a likelihood
6 of confusion in the marketplace.

7 Q A likelihood of confusion between what?

8 A Likelihood of confusion surveys are
9 predicated on the junior user's marketplace. In
10 other words, the newcomer to the market.

11 When people encounter the product or
12 service of the newcomer on the market, do they
13 mistakenly believe it comes from or is associated
14 with a prior entrant in that market. Or prior
15 entrant in any market, really.

16 Q Would you agree with me that the likelihood
17 of confusion survey involves presenting the members
18 of the universe with a product or service as it's
19 encountered at retail?

20 MR. CROSS: Objection to form.

21 A Well, you present them a product or service
22 in the context of when and how it's offered to
23 people. Many times it's not exactly because you're
24 not replicating the packaging or the other products
25 that might be adjacent to it.

1 PHILIP JOHNSON

2 BY MR. MEACHAM:

3 Q So you present them in context, but
4 sometimes you don't replicate the actual consuming
5 experience?

6 A No. What I'm saying is the context
7 determines the experience. So when you say
8 "actual," it's a survey. So it's "not actual."
9 It's a survey. So it's a replication of the
10 marketplace where the context is set out for what
11 the product or service is that you're going to
12 encounter.

13 Q Would you agree that in a likelihood of
14 confusion survey it is important to replicate
15 marketplace conditions?

16 MR. CROSS: Objection to form.

17 A In any survey you're doing you're trying to
18 replicate the context of the market or marketplace
19 conditions generally. Broadly.

20 BY MR. MEACHAM:

21 Q And would you agree with the statement that
22 the closer the survey methods mirror the situation
23 which the ordinary person would encounter the
24 trademark, the greater the evidentiary weight of the
25 survey results?

1 PHILIP JOHNSON

2 MR. CROSS: Objection to form.

3 A Well, that's legal opinion in terms of the
4 weight of the survey results. As I said, when you
5 design the survey, you provide the context so that
6 it's correctly positioned in the marketplace.

7 BY MR. MEACHAM:

8 Q Putting aside legalities, in your mind,
9 would a survey be worth more if it replicated the
10 way a consumer interacted with the brand in the
11 marketplace?

12 MR. CROSS: Objection to form.

13 A As I said, the survey is always designed to
14 be presented to someone in the context of how they
15 encounter in the marketplace. That's the correct
16 way to do it.

17 BY MR. MEACHAM:

18 Q So one that mirrors that experience more
19 closely is probably more worthwhile, correct?

20 MR. CROSS: Objection to form.

21 A I can't say -- it depends on the survey and
22 what the questions are and what the context is.

23 BY MR. MEACHAM:

24 Q Would you say that a survey that is closer
25 to the consuming experience is worth more than a

PHILIP JOHNSON

survey that doesn't mirror the consuming experience?

MR. CROSS: Objection to form.

A Again, as I said, it depends. You'd have to deal with a specific, not as a generality.

BY MR. MEACHAM:

Q Okay. Would you agree that it is important to employ survey stimuli that approximate what consumers might encounter in a normal shopping context?

A It depends.

Q What does it depend on?

A What you're testing.

Q What if you're testing a retail product?

A It depends what you're testing about the retail product.

Q Food. What if you're saying like brands of bread?

MR. CROSS: Objection to form.

A It depends what we are testing about the brands of bread.

BY MR. MEACHAM:

Q Likelihood of confusion.

MR. CROSS: Objection to form.

A Depends what the question is. Is it one of

1 PHILIP JOHNSON

2 the product's name or the trade dress or
3 combination, name and trade dress.

4 BY MR. MEACHAM:

5 Q So as a general matter, it's not important
6 to employ survey stimuli that approximate the
7 consuming experience, is that what you're saying?

8 MR. CROSS: Objection to form.

9 A That's not what I'm saying, no.

10 BY MR. MEACHAM:

11 Q But you said it depends?

12 A It does.

13 Q And it depends on the question that you're
14 asking?

15 A It depends on what you're trying to find
16 out.

17 Q What if you're trying to find out the
18 likelihood that the products will be confused?

19 A Depends on the basis. For example, if
20 you're trying to find out if the name is causing
21 confusion, you test the name. If you're trying to
22 find out if the trade dress is causing confusion,
23 you test the trade dress without the name. And if
24 you're trying to find out if the whole package in
25 its normal commercial context causes confusion, you

1 PHILIP JOHNSON

2 test the whole package.

3 Q Okay. Do you know that failure to
4 replicate marketplace conditions can be perceived as
5 a defect of a survey?

6 MR. CROSS: Objection to form.

7 A Again, as we said before, you always try to
8 replicate marketplace conditions. It depends on
9 what you're trying to measure.

10 BY MR. MEACHAM:

11 Q Have you done any likelihood of confusion
12 surveys in the frozen food market?

13 A Some time ago, yes.

14 Q Do you recall what it was for?

15 A Involved frozen pizza.

16 Q Do you recall who you prepared the report
17 for?

18 A I think it was for Kraft.

19 Q About how long ago was that?

20 A More than ten years ago.

21 Q And do you recall what you were asked to
22 do?

23 A Actually, no. It was about the name or the
24 packaging. I don't remember which.

25 Q And who retained you?

PHILIP JOHNSON

A Actually, it was inside counsel at Kraft.

Q So you prepared the report for Kraft?

A I did.

Q Was it prepared for purposes of litigation?

A I assume so.

Q But you don't recall?

A I didn't end up testifying. The case settled, so I don't know.

Q So it was in the context of litigation?

A Or threatened litigation of some sort. Certainly a litigious dispute.

Q Do you recall if Kraft was opposing a mark?

A Yes. When you say "opposing a mark," I don't know if this was -- I don't recall if it was TTAB or federal court.

Q Were they objecting to the use of the mark that closely resembled their mark?

A Either the name or the packaging of competitive frozen pizza.

Q What type of survey did you do?

A I don't recall.

Q Do you recall whether you provided an opinion regarding the likelihood of confusion in that case?

PHILIP JOHNSON

A I would think I did.

Q But you didn't testify?

A No.

Q Did you prepare a report?

A I don't recall.

Q We talked about this. In general, how do you go about designing a survey to study the likelihood of confusion?

A Design a survey based on reaching the correct universe, presenting them with either the mark or the trade dress or both, and determining whether or not they're confused as to source.

Q And is there only one way to go about designing a survey?

A Well, generally you use a methodology based on what's called an Ever Ready test.

Q Can you just generally describe the Ever Ready test?

A The Ever Ready test presents the mark to a respondent who is drawn from the correct universe and determines whether the mark is believed to be from the same source as the plaintiff mark or whether or not it's associated in some way or sponsored by.

PHILIP JOHNSON

Q So whose mark do you show to the respondent?

A The junior users.

Q So is the Ever Ready test the only test that you can use?

A It's called the gold standard. It's generally the test you use.

Q But is it the only one?

A There are other ways of testing.

Q What are those other ways?

A Well, the other ones tend to be variants on what's called a squirt design.

Q Can you generally describe the squirt design?

A Well, squirt designs presents first the product usually from the senior user, then the product from the junior user and ask whether they're related in some format.

It may be single products or in a display or array of products.

Q So in the Ever Ready test the respondent only sees the junior's mark, correct?

A That's correct.

Q And in variation of squirt design the

1 PHILIP JOHNSON

2 respondent gets to see both the junior user's and
3 the senior user's mark?

4 A Generally, Yes.

5 Q And that can be done in a variety of
6 different ways, correct?

7 A That's correct.

8 Q And you mentioned product arrays. Are
9 there any other ways?

10 A Well, you can see nomadic displays. You
11 can show multiple displays. You can show product
12 arrays, shelves. You can show ads. You can show TV
13 commercials.

14 Q Are those the only two ways you can design
15 a survey to study the likelihood of confusion?

16 A In the broad sense of either you show just
17 the junior user's mark, which is the normal way of
18 doing it, or you show both the senior user's and the
19 junior user's mark, which is the abnormal way of
20 doing it.

21 Q So those are the two options?

22 A Correct.

23 Q And then within those options there are
24 various number of ways you can go about studying --
25 or conducting the study?

PHILIP JOHNSON

A There are some, yes.

Q Would you agree that the design of the survey impacts the outcome of the survey?

MR. CROSS: Objection to form.

A If it's properly conducted, it shouldn't.

BY MR. MEACHAM:

Q Okay. So I guess what I'm saying is the choices that the survey designer makes, do you think -- when they're designing the study, do you think that impacts the outcome of the survey?

MR. CROSS: Objection to form.

A I don't understand that question.

BY MR. MEACHAM:

Q The question is: Do you think the choices you make when you design a survey impact the outcome of that survey?

MR. CROSS: Objection to form.

A Again, I don't understand the question.

BY MR. MEACHAM:

Q Okay.

A When you say impact the outcome.

Q Well, do you think they impact the results?

MR. CROSS: Same objection.

A Well, it's not the choices you make that

1 PHILIP JOHNSON

2 impact the results. It's whether you do something
3 correctly or not would be expected to impact
4 results.

5 BY MR. MEACHAM:

6 Q So if you don't design it correctly, then
7 that impacts the results?

8 A One would think so.

9 Q Okay. Would you agree that there's no such
10 thing as a perfect survey?

11 A I wouldn't use the term "perfect" to
12 describe surveys, but surveys are often done to a
13 high level of quality.

14 (Mr. Steve Berryman is now present.)

15 MR. CROSS: Steve Berryman is now in the room.

16 MR. MEACHAM: Why don't we take a break now.

17 (Recess held.)

18 BY MR. MEACHAM:

19 Q And so, Mr. Johnson, is that your way of
20 saying that no survey is perfect?

21 A Perhaps nothing in life is perfect.

22 Q After you design a survey, do you ever go
23 back and think you could have done something
24 different to enhance the survey?

25 A Well, generally I criticize my surveys

1 PHILIP JOHNSON

2 before I do them.

3 Q So you never go back and think, oh, I could
4 have done this better or I do have done that better?

5 A Well, I think generally you do that before
6 you launch the survey. So you design a survey, you
7 go through it and you say what could I do better?
8 And you do it. I can't recall a case on a
9 postmortem basis where I did that.

10 Q And you've been providing surveys for 35
11 years?

12 A More than that.

13 Q About how many --

14 A 42, I think. 41.

15 Q And in those 42 years you can't recall a
16 survey that you designed that you thought you could
17 have done a better job on?

18 A Surveys are iterative. You learn from
19 doing them so that as you go through life, the
20 survey you do today is probably going to look
21 different than the one you did 41 years ago.

22 So there's a learning and a -- there's a
23 learning mode you go through like anything else. If
24 that's what you mean.

25 Q Well, that actually wasn't my question. My

1 PHILIP JOHNSON

2 question was in those 42 years have you ever
3 designed a survey and then thought, oh, well, I
4 could have done something better on that survey?

5 A Nothing comes to mind, no.

6 Q Okay. Now, in preparing to do your study
7 or your survey, did you do any research on the Smart
8 Balance brand?

9 MR. CROSS: Objection to form.

10 A As I said, I went on the Internet and
11 looked at product.

12 BY MR. MEACHAM:

13 Q What did you look at on the Internet?

14 A Just products.

15 Q From?

16 A From Smart Balance.

17 Q From Smart Balance. Do you remember what
18 products those were?

19 A Not offhand. I mean, at least I do recall
20 margarine or margarine substitute products that they
21 make. There were quite a few products, but I don't
22 remember what they are.

23 Q You can't recall anything else?

24 A Not as we sit here.

25 Q Okay. What do you know about the Smart

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Balance brand?

A I know it's very popular. It's very widely available in the United States.

Q Anything else?

A No.

Q And do you know what products Smart Balance has?

A I looked at them at that time. I don't recall what they are all are. There are quite a few of them.

Q And aside from very popular and very widely available, how would you describe the Smart Balance brand?

A High quality.

Q Anything else?

A There was a family of different marks that were similar. I think one was Nature's Balance. There were a number of other ones that went on different products.

Q And would you say that that's the same brand as Smart Balance?

MR. CROSS: Objection to form.

A Well, it's a different brand, but it's from the same source.

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BY MR. MEACHAM:

Q When you see Nature's Balance does Smart Balance come to your mind?

A It does to me.

Q How would you describe Smart Balance's target customer?

A I don't know.

Q Would you agree that they target health-conscious consumers?

A My impression is that someone who values the quality and healthfulness of the product that they're using would be likely to value their products.

MR. CROSS: Could you please read back that answer for me.

(Record read as requested.)

BY MR. MEACHAM:

Q And do you know where Smart Balance products are sold?

A I don't know all the places they're sold. They're certainly in the dairy case.

Q Dairy case of supermarket?

A Anything. Anyplace that sells dairy. Supermarkets, gas stations, convenience stores, drug

1 PHILIP JOHNSON

2 stores. Anybody who sells --

3 Q Okay. So you would agree that Smart
4 Balance products are sold in the supermarket?

5 A I would.

6 Q Okay. And convenience stores?

7 A Yes.

8 Q How about Wal-Mart?

9 A Wal-Mart is a supermarket.

10 Q And Target?

11 A Target, some are -- Super Targets are
12 supermarkets. Wal-Mart Super Centers are
13 supermarkets.

14 Q And to your knowledge, are Smart Balance
15 frozen meals on the market currently?

16 A To my knowledge, no.

17 Q Have you ever seen Smart Balance frozen
18 meals at the supermarket?

19 A As far as I know, they're not on the
20 marketplace.

21 Q And you said that you looked at certain --
22 you went to supermarkets and looked at certain Smart
23 Balance brands, correct, or products?

24 A Well, I looked at products generally. I
25 looked at frozen entry products as well as the dairy

PHILIP JOHNSON

case products.

Q Is it fair to say that the consumers, including the respondents to your survey, have never encountered Smart Balance frozen meals in the marketplace?

A Well, it's fair to say that if they're not being sold in the market, it would be unlikely that a consumer could encounter them in a marketplace.

Q That's what I'm asking.

A That would be correct.

Q If Smart Balance goes forward with the line of frozen meals, do you know where they would be sold?

A I would expect them to be sold in the frozen meal section of each of these stores.

Q Frozen meal sections of supermarkets?

A Convenience stores, drug stores, anything who sells frozen dinners, frozen entrees.

Q You testified a little bit that you use the Ever Ready format, correct?

A I think that's correct, yes.

Q And the only thing shown to the respondents is the defendant's mark, correct?

A The defendant's mark, correct.

1 PHILIP JOHNSON

2 Q And why did you decide to do in this
3 instance -- let me restate that.

4 Why did you decide to use the Ever Ready
5 survey format in this instance?

6 A It's the generally accepted way to test a
7 mark in a dispute like this.

8 Q When you say "generally accepted,"
9 generally accepted by who?

10 A The TTAB as well as the federal and state
11 court systems.

12 Q Are you aware of any criticisms of the Ever
13 Ready test?

14 A Certainly.

15 Q What criticisms are you aware of?

16 A Well, there's really only one criticism and
17 that is that if a brand, or what we call the senior
18 user is totally unknown, people couldn't be
19 confused.

20 Q So the criticism is that if the senior user
21 is totally unknown, that the consumers will --
22 there's no likelihood that the consumers will be
23 confused? Is that what you just said?

24 A Well, there's no likelihood of confusion in
25 the marketplace. You wouldn't expect to find one.

1 PHILIP JOHNSON

2 Q Okay. Is that criticism only valid when
3 the senior user's mark is totally unknown?

4 A Yes. It's not actually a criticism. It's
5 an observation. In other words, you wouldn't expect
6 to have any confusion if the senior user's mark is
7 unknown. You wouldn't expect to have a likelihood
8 of confusion in the marketplace.

9 But if you're measuring the likelihood of
10 confusion in the marketplace, that is what you're
11 measuring. So some people consider that a
12 criticism. Some people consider it an observations.

13 Q I guess my question was, does it require
14 the senior user's mark to be unknown?

15 MR. CROSS: Objection to form.

16 A Now I'm confused.

17 BY MR. MEACHAM:

18 Q My question is, for that criticism to be
19 valid or that observation to be valid, does it
20 require the senior user's mark to be unknown?

21 A Yes.

22 Q Have you ever heard the criticism the
23 majority of marks are not strong enough for an Ever
24 Ready test?

25 A No, I have not.

1 PHILIP JOHNSON

2 Q Have you ever heard the criticism that the
3 Ever Ready test will consistently produce negligible
4 estimates of likelihood of confusion?

5 A Well, it doesn't. I have not heard that
6 criticism. But it's a fact that it does not.

7 Q Approximately how often do you use the Ever
8 Ready test?

9 A Nine out of ten times I do likelihood of
10 confusion studies.

11 Q You said you did about two dozen surveys in
12 litigation in the past year, correct?

13 A That's about right, yes.

14 Q How many of those were for the defendant?

15 A About half.

16 Q And so half were for the plaintiff?

17 A Correct.

18 Q Okay. And you said about nine times out of
19 ten you've used the Ever Ready test?

20 A Yes.

21 Q In your career?

22 A Yes.

23 Q Okay. Do you use it more often when
24 performing a survey for defendant?

25 A No.

PHILIP JOHNSON

Q In designing the study, did you give much thought to how you were going to present the mark to the survey respondents?

A Sure.

Q What was your thought process?

A Well, when you're conducting a survey that's going to be used in the TTAB or in federal court and it involves a trademark only, in other words, it doesn't involve the trade dress, as is generally the case with a registration in the TTAB especially, the mark itself is presented to people in what we call a bare way. In other words, it's done not stylized, nor does it have any other trade dress with it. It's simply the mark by itself.

Q How did you ultimately decide to present the mark?

A On an exhibit card to people in a mall intercept survey.

Q Can you describe the card?

A It's a piece of what we call cardstock, white, with the mark in black on it.

Q Okay. And you said that you -- that you wanted to present the mark in a bare way, not stylized. Why did you choose that way?

PHILIP JOHNSON

A It's typically the way you test a mark for
TTAB.

Q And when you say "typically," what do you
mean by that?

A Most of the time.

Q It's not a requirement, is it?

MR. CROSS: Objection to form. And foundation.

A It's the generally accepted way that
surveys are performed for matters that are in the
TTAB.

BY MR. MEACHAM:

Q Generally accepted by who?

A The TTAB.

Q And is it the only way that you can present
the mark?

A No. You can also do it verbally.

Q Any other ways?

A Those are the only two I'm familiar with.

Q So you can verbally present it or you can
show it as a bare mark?

A Correct.

Q And that's it?

A Yes.

Q Why did you select right balance as the

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control cell?

A Because it has the same look and feel as the term "smart." It's the same length term. It doesn't greatly change the meaning of the mark, so it makes it a very good control.

Q Why does that make it a very good control?

A Because that's what you're looking for in a control.

Q Why? Can you explain that?

A Well, you take the term that's at issue, in this case "smart," you eliminate it from the mark, and you substitute something else in the mark in lieu of the word "smart."

Q Is it imperative that the control cell have a similar meaning to the mark being studied?

A No.

Q Have you ever been part of a study where the control cell didn't have a similar meaning?

A Well, many times you can't have a similar meaning. Either it's not available in the sense that you can't make one up or your interpretation of what the meaning is and someone else's might differ, so the meaning of the control isn't really a tremendous part of the control.

1 PHILIP JOHNSON

2 Q What made you choose right?

3 MR. CROSS: Objection to form.

4 A It was just my opinion.

5 BY MR. MEACHAM:

6 Q Now, there are no frozen meals being sold
7 on the mark as right balance, correct?

8 A As far as I know there aren't, yes.

9 Q So in the survey the interview showed the
10 exhibit card to the respondent, correct?

11 A That's correct.

12 Q And didn't show the words on packaging for
13 the product?

14 A No.

15 Q And the interviewer would hand the exhibit
16 card to the respondent?

17 A Yes.

18 Q And then would say this is the name of a
19 frozen meal product that you might see in the frozen
20 food section of a grocery store?

21 A Yes. The instruction is to hand the
22 respondent the exhibit card and say, "This is the
23 name of a frozen meal product that you might see in
24 the frozen food section of a grocery store. Feel
25 free to comment if you wish on anything about it."

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2 record whatever comments they make. Then you take
3 away the exhibit and go on and ask the Ever Ready
4 questions.

5 Q And then the interviewer takes the exhibit
6 card back?

7 A Yes.

8 Q Makes sure the exhibit card is out of
9 sight?

10 A Yes.

11 Q And what's the purpose of doing that?

12 A Well, you always do it that way so that
13 what you're measuring is the total commercial
14 impression of the mark, which is what you're
15 supposed to be measuring, and not just doing a
16 reading test on whether someone can subsequently
17 read it back to you.

18 Q So the purpose is to reduce the number of
19 people that say Smart Balance when they're asked
20 about the source of the product?

21 A Well, it's not to reduce the number of
22 people to do anything. It's to find out what was
23 the commercial impression that was made by the mark.

24 So, for example, if you're trying to
25 measure confusion, you want to have what did they

1 PHILIP JOHNSON

2 see, what they ask feel, what impression did they
3 get from the mark. You don't want to have new
4 judgments being made by reading back what's on the
5 card, which doesn't really tell you anything except
6 that they can read the card.

7 Q When a consumer purchases a frozen meal
8 from a grocery store, are the brand names hidden
9 from them?

10 A I don't know. I never saw them do that.

11 Q So in your experience as a consumer, you --
12 when you purchased a frozen meal -- well, have you
13 ever purchased a frozen meal before?

14 A I have.

15 Q And in your experience as a consumer, are
16 the brand names hidden from consumers at the
17 supermarket?

18 A You don't hide the brand name at the
19 supermarket, just like when you give them the card,
20 you don't hide the brand name. It's on the card
21 just like it's on the package.

22 Q And when you showed defendant's mark Smart
23 Balance, that's the mark that they have registered,
24 correct?

25 MR. CROSS: Objection to form.

1 PHILIP JOHNSON

2 A It's the mark they've applied to register.
3 I don't know if they have it registered.

4 BY MR. MEACHAM:

5 Q So in your study you only showed one
6 frozen meal brand name to the respondents, correct?

7 A Only showed one frozen meal brand name to
8 the respondents.

9 Q And you never showed the respondents the
10 Smart Ones mark?

11 A It is an Ever Ready test. You only show
12 the junior user's mark.

13 Q And you never informed the respondents of
14 the existence of the Smart Ones mark?

15 A I don't know why you would ever do that.

16 Q I'm just asking. Did you?

17 A I haven't here nor in any other survey I've
18 ever conducted.

19 Q Okay. Would it be fair to say that by not
20 showing the Smart Ones mark, you prevented
21 respondents who were unaware of Smart Ones from
22 comparing it to the Smart Balance mark?

23 A I don't know what you mean by "comparing it
24 to."

25 Q Well, if, you know, if someone was unaware

1 PHILIP JOHNSON

2 of the Smart Ones mark, you know, in your survey and
3 you only showed them the Smart Balance mark, is that
4 a way of preventing them from comparing the two
5 marks?

6 MR. CROSS: Objection to form.

7 A No, it doesn't prevent them from doing
8 Anything.

9 BY MR. MEACHAM:

10 Q But if they're unaware of the product, how
11 can they compare it?

12 A Well, it doesn't prevent them from
13 comparing it. What you're saying is their lack of
14 awareness prevents them from comparing something.
15 Not the survey.

16 Q Okay. And does the lack of awareness --
17 strike that.

18 Would you agree with me that when a
19 consumer purchases a frozen meal from a grocery
20 store, the consumer would most likely encounter
21 several different brand names?

22 MR. CROSS: Objection to form and foundation.

23 A It depends on the consumer and how they
24 shop.

25 BY MR. MEACHAM:

1 PHILIP JOHNSON

2 Q Okay. Would you say most consumers would
3 see multiple brand names?

4 A Depending on the store, they should.

5 Q Okay. In a supermarket are many -- in the
6 frozen food section of a supermarket are frozen
7 meals together usually?

8 A They're in the same what we call the frozen
9 food section.

10 Q Okay. So different brands of frozen meals
11 are likely to be found in the same section of the
12 supermarket, correct?

13 A They're in the frozen food section.
14 Different markets have different planograms and how
15 you present meals to people, or how you present
16 products to people.

17 So in some cases, especially in big stores,
18 they may have a door or a part of a door or a series
19 of shelves that they devoted to a particular brand,
20 which is why you can walk to that door and just look
21 at the one brand you want because you know it
22 because you shop at the same store once or twice a
23 week, and that's the only brand they see.

24 Others will look from door to door to door
25 and see multiple brands. So it depends on the

1 PHILIP JOHNSON

2 store. And then like a convenience store, for
3 example, usually does not have that. They'll have
4 maybe one or two selections of each brand and they
5 may be mixed in a case.

6 Q Would you say it's realistic that a
7 consumer would only see one brand when shopping for
8 a frozen meal?

9 A Typically, if you go to a large grocery
10 store, you see a section of a certain brand of
11 frozen meal by itself and then there are other ones
12 flanking it, sometimes above or below it, but the
13 idea -- the organizing principle is brand.

14 Q You said above and below, so it could be on
15 the same case, right?

16 A Depends on the size of the store and on the
17 number of SKUs that they have in the frozen food
18 section.

19 Q So they could be in the same case?

20 A Could be. Or they could be in separate
21 cases.

22 Q But they're in the same section?

23 A They're all in a frozen food section. They
24 have to be in a freezer case to survive.

25 Q Okay. So is it fair to say that it would

1 PHILIP JOHNSON

2 be unusual for a consumer in a grocery store to see
3 one brand name of a potential frozen food meal?

4 MR. CROSS: Objection to form and foundation.

5 A As I just explained, no, it wouldn't be
6 unusual.

7 BY MR. MEACHAM:

8 Q Would you say it's typical?

9 A Depends on the store you shop, size of the
10 market you're in. In some stores it's typical. In
11 some stores it's atypical.

12 Q What is the purpose of the control cell?

13 A The control cell is designed to measure
14 what's called noise or guessing or brand share
15 associations.

16 So, for example, if I'm going to name
17 something because it's popular possible brand in the
18 genre, I can tell from the control what percent of
19 people would name that brand irrespective of the
20 presence or absence of the term at issue.

21 Q And does confusion in between the senior
22 mark and the control cell, does that lessen the
23 likelihood of confusion between the junior user and
24 the senior user?

25 A I don't know what you mean by "lessen."

1 PHILIP JOHNSON

2 You need to know that number because it's irrelevant
3 in terms of measuring actual confusion. What it is
4 relevant to is the number of guessing or brand share
5 mentions that should be subtracted from whatever
6 number you find in the test cell, so you use the
7 results of the control celling to adjust the test
8 cell to get rid of those random mentions or brand
9 share mentions.

10 Q In a survey testing a dominant mark, would
11 that mean that -- say, for instance, you know, the
12 survey involved choose, like Nike, would the fact
13 that Nike is the first thing that comes to someone's
14 mind, would that lessen the possibility of confusion
15 between the senior and the junior mark?

16 MR. CROSS: Objection to form.

17 A No. No. It doesn't lessen it. What it
18 means is that you're going to have a higher noise
19 level. But it's going -- the noise level would be
20 found in both the test cell and the control cell, so
21 as long as you know what it is, you subtract it.

22 BY MR. MEACHAM:

23 Q So after showing the cards, you ask the
24 consumer -- well, what did you ask the respondents?

25 A The series of questions that were set up

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were based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you or do you not have a belief, and if they have a belief, you ask them what was their belief, and then what makes them say that.

And then you go on, and then ask the second set of questions in the Ever Ready, what other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you or do you not have a belief, and any others, they can name multiples, and for each one we ask what makes you say that.

We go on and ask again the third question which is what other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you or do you not have a belief. Again, the reason for each and what brand that is.

Q And where is the interview conducted?

A In a private research facility within the shopping mall.

Q Is it like an office?

A It's in an office, yes.

1 PHILIP JOHNSON

2 Q And the respondents were asked who the
3 source of the product is off the top of their head?

4 A Not off the top of their head. It's based
5 on the commercial impression that the name made when
6 they were exposed to it.

7 Q So aside from the name card or the exhibit
8 card, was there anything else given to them -- let
9 me rephrase that.

10 So aside from the exhibit card, was there
11 anything else the respondents based their responses
12 on?

13 A Just their knowledge of the frozen food
14 section.

15 Q Would you say that that mimics how
16 consumers would encounter brand names in real life?

17 A Certainly.

18 Q Why would you say that?

19 A Because they're presented with a brand name
20 within the -- that they might see in a frozen food
21 section of a grocery store and asked what their
22 belief is based on that name.

23 Q Would you say that your study design
24 replicates a consumer's purchasing experience?

25 A It does in respect to the name, yes.

1 PHILIP JOHNSON

2 Q How do?

3 A Because they're presented with a name in
4 the context that they would encounter it in the
5 marketplace.

6 Q On an exhibit card?

7 A Yes.

8 Q Have you ever designed a likelihood of
9 confusion study where you showed the respondents a
10 picture of products on store shelves?

11 A Yes.

12 Q When have you done so?

13 A I've done so a number of times.

14 Q And what would be the purpose of designing
15 a study like that?

16 A If you're testing the brand and trade
17 dress. It's the whole package and at times the
18 point of sale materials, but you can present the
19 whole package in the normal context that it would be
20 encountered in the marketplace.

21 Q And why would you design a study like that?

22 A If you're trying to test likelihood of
23 confusion for the entire package and trade dress.

24 Q Would you say that that type of survey more
25 accurately reflects a consumer experience than the

1 PHILIP JOHNSON

2 Ever Ready test?

3 MR. CROSS: Objection to form.

4 A It is an Ever Ready test.

5 BY MR. MEACHAM:

6 Q Or can be an Ever Ready test?

7 A Is an Ever Ready test.

8 Q What is?

9 A Showing them the whole package and the --
10 with the brand.

11 Q What about several brands side by side?

12 A That's an array test.

13 Q So that's not an Ever Ready test, correct?

14 A Well, again, it can be an Ever Ready test.

15 Q Wouldn't that show more than just the brand
16 name, than just one brand name?

17 A Well, you would have to ask people about
18 the package that you're interested in. But you
19 could show it to them with other things around it.

20 Q So describe for me what you just -- so you
21 would show just the one package with one name and
22 then have --

23 A Well, classically, let's say it's a shelf
24 of wine bottles and you want to see the brand, the
25 name, and the context that you would normally

1 PHILIP JOHNSON

2 encounter it in, and then you ask people about a
3 particular bottle, for example.

4 Q And are other brand names of bottles
5 included in the image that you show?

6 A You can. You can either show the one by
7 itself or you can show a number of different
8 products.

9 Q And what does a study like that measure?

10 A Likelihood of confusion.

11 Q You didn't do that here, did you?

12 A I tested just the name, not the packaging.

13 Q But all -- so you didn't show any product
14 arrays?

15 A I just showed them the name on the card,
16 not the packaging.

17 Q Is there any possibility of confusion in
18 the study based on the isolation of one brand?

19 MR. CROSS: Objection to form.

20 A Don't understand that question.

21 BY MR. MEACHAM:

22 Q Like is it true that by showing the brand
23 Smart Balance in isolation you are creating the
24 impression that Smart Balance already makes frozen
25 food meals?

1 PHILIP JOHNSON

2 A You telling them that Smart Balance is the
3 name of a frozen meal product they might see in
4 frozen food sections. So the fact that they're not
5 familiar with it would not be a variable. The
6 assumption is there is such a thing.

7 Q So it could create the impression that
8 Smart Balance makes frozen food meals?

9 A You could believe it's Smart Balance. Or
10 you could believe Smart Balance is a brand from
11 Stouffer, for example, or someone else.

12 Q In fact, people in this survey responded
13 that Smart Balance created a frozen meal brand
14 like --

15 A Some people did.

16 Q Okay. In fact, would you say that of the
17 people who had a belief of the source, would you say
18 that most of them believed Smart Balance made the
19 brand?

20 A Well, in answer to the source question, 4
21 percent for Smart Balance, 3 percent for Lean
22 Cuisine, 3 percent for Weight Watchers, 3 percent
23 for Healthy Choice, which are all about the same
24 statistically.

25 Q But the people he who responded Smart

1 PHILIP JOHNSON

2 Balance, that was the highest percentage of people,
3 correct?

4 A Well, as I said, statistically it's about
5 the same as Lean Cuisine, Weight Watchers, and
6 Healthy Choice.

7 Q But one is 4 percent and one is 3 percent,
8 correct?

9 A Yes. In the sample size of 205, there's no
10 statistically significant difference between the
11 four and the three.

12 Q Is it possible that some respondents who
13 were shown the Smart Balance card believed that
14 Smart Balance actually was Smart Ones?

15 A One person, I believe, or 1 percent in the
16 test cell said Smart Ones.

17 Q I know that. I'm asking a different
18 question.

19 Is it possible that the people that
20 responded that Smart Balance made or was the source
21 of Smart Balance frozen meals, is it possible that
22 those people actually mistook Smart Balance for
23 Smart Ones?

24 MR. CROSS: Objection, form.

25 A No.

1 PHILIP JOHNSON

2 BY MR. MEACHAM:

3 Q Why is it not possible?

4 A Because I asked them who they believe and
5 they said either Smart Balance or Smart Ones made
6 the product they were shown. So if they thought
7 that, they would have said Smart Ones.

8 Q I'm saying is it possible that they
9 actually -- that they believed Smart Balance was
10 Smart Ones and they just were unaware of the Smart
11 Ones mark?

12 A Then they would have said Smart Ones to
13 question 2(a).

14 Q Which is?

15 A The 1 percent.

16 Q For the test cells, 73 percent of the
17 participants responded that they did not have a
18 belief as to which company makes the frozen meal
19 product, correct?

20 A Correct.

21 Q Is that a significant number?

22 A What do you mean by significant?

23 Q Is that a high number?

24 A It's not atypical.

25 Q Do you typically receive a large number of

1 PHILIP JOHNSON

2 I don't have a belief responses?

3 A Depends on how widely known the brand is
4 that you're showing people on the card.

5 Q In the range of the surveys that you've
6 done, would you say that that's a high number?

7 A I'd say it's pretty typical for a brand
8 that hasn't been selling product in the frozen food
9 case prior to the survey.

10 Q So if Smart Balance was actually selling,
11 the numbers would be higher -- of people who have a
12 belief as to the source of the product?

13 A One would think -- typically you would have
14 more Smart Balance mentioned. It would be somewhat
15 higher.

16 Q For the control cell, 72 percent responded
17 that they didn't have a belief, correct?

18 A Yeah. Statistically same number.

19 Q And 82 percent of test cell respondents
20 stated they did not have a believe regarding whether
21 the company that made Smart Balance made other
22 products it or brands, correct?

23 A That's correct.

24 Q And 87 percent of the test cell respondents
25 did not have a belief regarding, related,

1 PHILIP JOHNSON

2 associated, or licensed brands?

3 A Correct.

4 Q In response to the question -- we'll just
5 use the first, question 2 -- if I can direct you to
6 paragraph 29 of your report. Are you looking at the
7 question 2(a)?

8 A Paragraph 29, question 2(a).

9 Q Okay. And is there any significance in the
10 fact that people responded with 11 different brands?
11 Does that impact your analysis in the study at all?

12 A It's what you would expect if there's no
13 confusion with any particular brand.

14 Q Having an appropriate universe for a study
15 is extremely important, right?

16 A It's very important, yes.

17 Q And if the universe for a survey is
18 overbroad, that affects the value of the survey
19 results?

20 A Universes that are overbroad or
21 underinclusive will affect the weight accorded to a
22 survey. It doesn't really affect the result. It
23 affects what you can project the result to.

24 Q And how does an overbroad universe affect
25 the results of the survey?

1 PHILIP JOHNSON

2 A It doesn't affect the results of the
3 survey. It affects who you apply it to. So you're
4 applying it to the universe that you tested.

5 Q So it doesn't affect the results. Could it
6 affect the results?

7 A The results are the results. I don't
8 understand.

9 Q Could it affect the results of the survey?
10 For instance, if you have an inappropriate or
11 inappropriately large population, could that reduce
12 the likelihood of confusion?

13 MR. CROSS: Objection to form.

14 A Well, an overly broad universe, if you have
15 an overly broad universe, you look at the subset of
16 the universe that would be -- if you think you're
17 overly broad, you would look at a subset of it and
18 see if the result is missing, but an overly broad
19 universe always contains the lesser universe.

20 If you're overly broad, then the less broad
21 universe is contained within it, and generally you
22 can look at those people individually and see if
23 there's any difference.

24 BY MR. MEACHAM:

25 Q You did say that in an inappropriate

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universe affects the weight given to a survey?

A Yes.

Q And the appropriate universe for the survey is the junior user's market?

A Correct.

Q Why is that?

A That's the whole theory of likelihood of confusion.

Q Is that --

A Well, it's in McCarthy's treatise, among other things, but it's the generally accepted standard that I've always seen applied in court and at the TTAB.

Q Is it difficult to define the junior user's market when the product has not been produced or sold yet?

A No.

Q In that instance what do you do?

A You look at the registration.

Q Okay.

A Intent to use.

Q And what was the defined universe for your survey?

A Current and prospective consumers of frozen

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meal products.

Q Is there any other limitations?

A Well, they have to be the purchasers of a product.

MR. CROSS: Want to belatedly object to form.

BY MR. MEACHAM:

Q So your universe includes all people who have purchased or intend to purchase any type of frozen meals, correct?

MR. CROSS: Objection to form.

A Frozen meals.

BY MR. MEACHAM:

Q So that's any type of frozen meal?

A Well, it's frozen meals. It's not specified a particular type.

Q Okay. Do you think your survey universe includes respondents who were not aware of Smart Ones?

A Well, my understanding is that Smart Ones is a fairly large brand in the industry, so they should be -- most people should be aware of it.

Q But the question was do you think your survey universe includes respondents who are not aware of Smart Ones?

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A Who are not aware?

Q Yeah.

A I don't know if there is anyone who was not aware.

Q And why don't you know?

A There's no way I would know.

Q Because you didn't ask whether they were aware or not?

A Well, I shouldn't.

Q Okay. And your universe isn't limited to those who purchase single serving frozen meals?

A No.

Q And it doesn't limit the universe of those who purchase frozen meals geared toward a health conscious consumer?

A No, it does not.

Q And it doesn't limit the universe to persons who were aware of Smart Ones?

A No, it does not.

Q And it doesn't limit the universe to persons who purchase Smart Ones?

A No, it does not.

Q Have you ever designed a survey that limited the universe of the study to people who knew

1 PHILIP JOHNSON

2 of the product?

3 MR. CROSS: Objection to form.

4 A I can't recall any.

5 BY MR. MEACHAM:

6 Q Okay. You would agree with me that brand
7 customers are important?

8 A Could you repeat that?

9 MR. CROSS: Objection to form.

10 BY MR. MEACHAM:

11 Q Yeah. Would you agree with me that a
12 brand's current customers are very important?

13 A Not sure what you mean.

14 Q Well --

15 A Important to what?

16 Q To the company that puts the brand out.

17 A Companies who put brands out like their
18 customers, I would think.

19 Q So would you agree with me that a brand's
20 current customers are very important to the brand?

21 MR. CROSS: Object to the form.

22 A Again, I don't know whether their current
23 customers are important. It depends on the company.
24 I would assume a company valued their customers.
25 But it would depend on the individual company.

1 PHILIP JOHNSON

2 BY MR. MEACHAM:

3 Q And would you assume that the potential
4 loss of a brand's current customers would be very
5 concerning to a company?

6 MR. CROSS: Objection to form and foundation.

7 A A company's fortunes are generally of
8 concern to a company. So to the extent they do good
9 or bad in the marketplace is usually an issue for
10 them. If they're normal.

11 MR. MEACHAM: I think I'm in a good place for a
12 break.

13 (Recess held.)

14 BY MR. MEACHAM:

15 Q Mr. Johnson, what are some of the ways you
16 can predict future consumer behavior?

17 A Well, some people think a crystal ball is
18 good, but generally you study past behavior and
19 current behavior and you talk to people about what
20 they think they're going to do in the future.

21 Q So current, past, and future behavior?

22 A And people's opinion about why they do
23 things and what they think they're going to do in
24 the future.

25 Q And is there a particular order in which,

1 PHILIP JOHNSON

2 though -- you know, in what's the best way to
3 predict future consumer behavior?

4 A I don't understand that question.

5 Q You mentioned that some of the ways that
6 you can predict future consumer behavior. Is either
7 of the ways or any of the ways better than the
8 other?

9 A Is it better?

10 Q Like a better indicator?

11 A What you do is you look at the past, you
12 look at the present, and then you talk to people
13 about their beliefs of why they do what they do and
14 what they believe and you make an attempt or crystal
15 ball assessment of the future.

16 Q Would you say past behavior is a good
17 predicator of future behavior?

18 A Depends. The problem is there are
19 interstitial events that happen in the world which
20 change future behavior that you can't predict.

21 Q Okay. Is intended behavior a good
22 predicator of future behavior?

23 A It's one of the predictors you use, yes.

24 Q I mean, is it a good predicator is what I'm
25 asking?

1 PHILIP JOHNSON

2 A Depends what you mean by "good."

3 Q Okay. Would it be fair to say that some of
4 the people in your survey who responded they might
5 buy a frozen food meal in the next 30 days may not
6 actually buy a frozen food meal in the next 30 days?

7 A It's always possible.

8 Q So some people who said that they were
9 going to buy a frozen food meal didn't buy a frozen
10 food meal?

11 A Oh, we don't know.

12 Q But is it possible?

13 A I think I said a moment ago that it's
14 possible that someone who intended to buy a frozen
15 food meal didn't, just like it's possible for
16 someone who didn't intend to buy one to it actually
17 buy one.

18 Q Uh-huh. And so the survey, by its nature,
19 includes people who are not actually part of the
20 relevant market and would exclude some people who
21 were part of the relevant market?

22 A No. That's not what I said.

23 Q Okay. What did you say?

24 A I said that it's possible that someone who
25 intends to buy a frozen food product in the future

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won't actually do so and that it's also possible that someone who doesn't intend would do so, but that doesn't effect the degree to which those people do or do not properly belong to the universe for purposes of measuring the impression they get when they encounter this particular brand in this particular context in the marketplace.

Q But the people who say that they don't intend to buy a frozen food meal are excluded, correct?

A Only if they hadn't bought one in the past. So if you have people who have never bought one and don't intend to buy one, they are excluded. Even though it's conceivable that some day they may actually buy one.

Q Would you agree that many consumers make purchasing decisions at the point of sale?

A Well, many consumers will select the actual particular package or flavor or product they're looking at at point of sale.

Q And is it fair to say that point of sale marketing attempts to get consumers to make a decision on brands at the point in time when they are purchasing something?

1 PHILIP JOHNSON

2 A Well, point of sale is designed either to
3 inform, for example, as to a price opportunity,
4 which may affect the quantity you buy or it may
5 affect the brand that you buy, or point of sale can
6 tell you something, information about a product, or
7 it can make a product announcement, or it can do a
8 lot of other things. But it's trying to get your
9 attention at that particular place.

10 Q And would you say that the ultimate goal is
11 to have them purchase the product?

12 A The ultimate goal of all information in a
13 supermarket is to help the consumer or to inform a
14 purchase.

15 Q Inform a purchase. Is that just another
16 way of saying to purchase the product?

17 A No. To inform a purchase. In other words,
18 you give people information as to price, product,
19 nutrition, similarities, promotions, other things,
20 and they make their decisions about what they're
21 going to buy and how they're going to do it;
22 although, consumers are pretty good about getting
23 what they want when they go into a store.

24 Q But ultimately the goal is for them to pick
25 your product, correct?

1 PHILIP JOHNSON

2 A Well, that's the manufacturer's goal. The
3 consumer's goal is to get the product they want.

4 Q Is point of sale identification of a brand
5 different than viewing a brand name on a cue card?

6 MR. CROSS: Objection to form.

7 A Depends on the point of sale.

8 BY MR. MEACHAM:

9 Q Let's take frozen food aisles.

10 A It depends on the particular point of sale
11 piece. It may be simply -- most point of sale tends
12 to be like a billboard, very much like a brand on a
13 card.

14 Q So it would be very much like a black and
15 white cue card?

16 A Or color. Or stylized.

17 Q With just a single name on it?

18 A It depends.

19 Q Is point of sale marketing identification
20 important?

21 MR. CROSS: Objection to form.

22 A Important to whom?

23 BY MR. MEACHAM:

24 Q The company that puts out the brand.

25 MR. CROSS: Objection to form.

1 PHILIP JOHNSON

2 A It depends on the product and what is on
3 the point of sale and whether it's effective in any
4 way.

5 BY MR. MEACHAM:

6 Q Is it important to the consumer?

7 MR. CROSS: Objection to form.

8 A Consumers don't generally like point of
9 sale, no.

10 BY MR. MEACHAM:

11 Q Would you agree that point of sale
12 marketing on identification can trigger brand
13 awareness?

14 A That's why it's often used as a billboard
15 like a cue card, with just a name on it, pretty
16 much.

17 Q Okay. And is it your view that point of
18 sale marketing and identification is similar to a
19 cue card with the single name on it?

20 A The theory of point of sale marketing, if
21 you're an advertiser, is you are not going to get
22 what they call a read. It's not going to sit down
23 and read through like a page of a newspaper ad, so
24 point of sale tend its to be very brief and very
25 focused, either on price or on some other aspect of

1 PHILIP JOHNSON

2 a product, so it usually has very few words on point
3 of sale. Not unlike a cue card.

4 Q Have you seen many point of sale
5 advertisements that look like cue cards?

6 A Generally they're not blank cards.

7 Q Are they often black and white?

8 A You don't see much black and white outside
9 of price information in a supermarket.

10 Q Would you agree that your survey likely
11 does not capture consumer confusion that might occur
12 at the point of sale?

13 MR. CROSS: Objection to form.

14 A I do not agree, no.

15 BY MR. MEACHAM:

16 Q Okay. Why not?

17 A Because the context of it was exactly
18 putting people at the point of sale. That was the
19 content of the exposure in the question.

20 Q It's a single cue card with black and white
21 on it?

22 A To measure the impact of the name alone,
23 yes.

24 Q So that captures confusion as it might
25 occur in the supermarket?

1 PHILIP JOHNSON

2 A Yes, it does.

3 Q So the showing of a white cue card with
4 black writing would replicate the consumer confusion
5 that might occur at the point of sale?

6 A Based on the name, yes.

7 Q Before you designed your survey, did you do
8 any research on the Smart Ones brand?

9 MR. CROSS: Objection to form.

10 A I think I answered that when we started.

11 BY MR. MEACHAM:

12 Q Other than looking -- did you look online?

13 A As I said earlier, I read the Complaint,
14 which describes their product. I looked online and
15 I visited the store.

16 Q You testified earlier that you looked
17 online and visited the store for the Smart Balance
18 products. Did you do the same for the Smart Ones
19 products?

20 A I did.

21 Q And what types of products did you look at?

22 A I don't remember what the array was.

23 Q Did you look at their frozen food meals?

24 A I believe I did. It was a long time ago,
25 so --

1 PHILIP JOHNSON

2 Q Anything else?

3 A Whatever drill downs were available online
4 as well as what I saw in the store.

5 Q So you're saying that you looked at both
6 products, both online and in the store?

7 A Well, the Smart Balance product was not
8 available in the frozen food section in the store,
9 but I did look at the frozen food section meals
10 which did have the Weight Watchers and Smart Ones
11 product.

12 Q Did you discuss the Smart Ones brand with
13 anyone?

14 A No.

15 Q And what do you know about the Smart Ones
16 brand?

17 A What it said in the Complaint pretty much.

18 Q Which is?

19 A I don't recall.

20 Q You would agree with me that Smart Ones
21 brand is sold in supermarkets, correct?

22 A Again, as I thought we said earlier, I said
23 it's sold in supermarkets, convenience stores, gas
24 stations, drug stores, anybody who sells frozen food
25 entrees.

1 PHILIP JOHNSON

2 Q I believe when we spoke earlier you were
3 discussing Smart Balance. I'm asking about Smart
4 Ones.

5 A Well, my understanding is that anyone with
6 a frozen food offering can sell Smart Ones. Whether
7 they do or not would be their choice.

8 Q Okay. So those would likely be
9 supermarkets, Wal-Mart, Target, convenience stores,
10 those types of --

11 A Would be the Wal-Mart Super Center, the
12 Super Target, convenience stores that sell frozen
13 foods, gas stations that sell frozen foods. Anyone
14 who sells frozen foods can offer it.

15 Q And of course supermarkets?

16 A Yes. I thought I said that.

17 Q And what segment are the Smart Ones frozen
18 meals sold in, segments of the store?

19 A My understanding is that Smart Ones is sold
20 in the frozen foods section.

21 Q Do you know anything about the consumer
22 that Smart Ones targets?

23 A Well, considering they also use the Weight
24 Watchers brand on Smart Ones, and I would assume
25 they're targeting people who are concerned about

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health and nutrition.

Q Since you submitted your report, have you had an opportunity to review it in its entirety?

A Yes.

Q And based on your review, are there any corrections that you would wish to make?

A No, there are not.

Q Any changes to the design of the survey that you wish you would have made?

A No, there are not.

Q Does the report completely and accurately reflect the work that you did and your conclusions?

A I hope it does.

Q Would you agree that a company protecting its brand or mark should look to see if competitors are using the brand or mark?

A Could you repeat that?

Q Certainly. Would you agree that a company protecting its mark should look to see if competitors are using the mark?

A I believe in what's called policing, which is the right or obligation of a company who has a trademark to see if other people are violating that trademark in some way.

1 PHILIP JOHNSON

2 Q And would you agree that a company
3 protecting its mark should look to see if
4 competitors are using part of the mark?

5 MR. CROSS: Objection, form.

6 BY MR. MEACHAM:

7 Q Such as part of a name?

8 MR. CROSS: Objection to form.

9 A I think they should look, yes.

10 BY MR. MEACHAM:

11 Q Okay. In the course of designing and
12 conducting your study, were you aware that Smart
13 Balance has previously opposed trademark
14 registration for other brands that have attempted to
15 use the word "smart" in their name?

16 A I don't know. I know that the term "smart"
17 has become far more common in the last decade than
18 it was many years ago, so there are a number of
19 brands that use the term "smart."

20 Q But are you aware that Smart Balance has
21 previously opposed trademark registration?

22 A I don't have specific information about
23 that, but it wouldn't surprise me.

24 Q Were you aware that Smart Balance opposed a
25 mark known as Smart Goodness?

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A I'm not aware of that specifically.

Q Were you aware that Smart Balance opposed a mark known as Smart Cakes?

A Again, no specific awareness of that.

Q Were you aware that Smart Balance opposed a mark known as Smart Salt?

A I don't know of that one.

Q Were you aware that Smart Balance opposed a mark known as Smart Chili?

A No.

Q Were you aware that Smart Balance opposed a mark known as Smart BBQ?

A No.

Q Were you aware that Smart Balance opposed a mark known as Smart Veggie?

A No.

Q Were you aware that Smart Balance opposed a mark known as Smart Bake?

A No.

Q Were you aware that Smart Balance opposed a mark known as Smart Sausage?

A No.

Q Were you aware that Smart Balance opposed a mark known as Smart Heart?

1 PHILIP JOHNSON

2 A No.

3 Q Okay.

4 MR. MEACHAM: Well, I think we're going to take
5 a break for now. I'm going to review my notes and
6 see what we have left.

7 (Recess held.)

8 BY MR. MEACHAM:

9 Q Mr. Johnson, could I direct your attention
10 to paragraph 29 of your report.

11 A Yes.

12 Q And for the test cell, is it fair to say
13 that the -- that of the people who had a belief
14 regarding the source of the frozen food meal, more
15 people identified that source as Smart Balance than
16 any other company?

17 A I thought we discussed this earlier.
18 Statistically the number we say Lean Cuisine, Weight
19 Watchers, Healthy Choice, is not statistically
20 significantly different from the Smart Balance
21 mentions, so I would consider them to be equal.

22 Q But the number of people who responded with
23 Smart Balance as the source is more than the number
24 of people that responded with Lean Cuisine, correct?

25 A No, that's not correct.

1 PHILIP JOHNSON

2 Q I mean, even -- so you're saying that the
3 more people, you know -- you had it at 4 percent
4 versus 3 percent. So you're saying it's not
5 statistically significant. I understand that.

6 But would you agree that more people
7 identified Smart Balance than Lean Cuisine?

8 A No, I would not. "More" is a comparative
9 term. When you compare two numbers, they have to be
10 statistically significantly different from one
11 another for one to be more and one to be less.

12 Q So that 1 percent is not statistically
13 different?

14 A No.

15 Q Is 3 percent statistically significant?

16 A Depends. The standard error rate for the
17 key measures at the 20 percent level is plus or
18 minus 4.1. So if you're comparing 4 and 3, you
19 would have to compute the standard error for it. It
20 should be around -- for level of competence, which
21 should be about 2.5. I'd have to use a calculator
22 to do it exactly.

23 Q But how about 4 and 1? Is that --

24 A Well, that would be more than 2.5, so that
25 would be statistically significantly different.

1 PHILIP JOHNSON

2 Q So looking at paragraph 30 of your report.

3 A Yes.

4 Q Would you agree that in response to
5 question 3-A, more people identified Smart Balance
6 products than any other brand?

7 A Well, 5 percent said grocery products
8 generally, which is the same as Smart Balance
9 products generally when you take multiple products
10 like milk, butter, eggs, mayonnaise, peanut butter,
11 etc., other things that are part of the Smart
12 Balance --

13 Q But I asked about brands.

14 A What I'm saying is the Smart Balance
15 product is not a specific brand. It's the whole
16 product line.

17 Q But they identified it as Smart Balance
18 products, correct?

19 A Well, I identified them as Smart Balance
20 products based on the --

21 Q So the actual response were --

22 A Things like milk --

23 MR. CROSS: Could you just let him finish the
24 answer before you jump in?

25 MR. MEACHAM: Sure.

1 PHILIP JOHNSON

2 A If somebody said the other products that
3 come from the same people are milk or butter or
4 eggs, I put those in the category called Smart
5 Balance products. They didn't use the word Smart
6 Balance.

7 BY MR. MEACHAM:

8 Q Okay. And why did you do that?

9 A Because that's the category. These are
10 related products that come from the same people.

11 Q So even though the respondent just simply
12 said milk or butter or eggs, and they didn't say
13 Smart Balance products or Smart Balance milk or
14 Smart Balance butter, they were grouped into that
15 category?

16 A That's correct.

17 Q So what's the difference between that
18 category and grocery products?

19 A Grocery products it would include things
20 like cereal or bread or other things that aren't
21 Small Balance products.

22 Q So grocery products includes a group of
23 people that said, oh, yes, Smart Balance makes -- or
24 the same company makes soda.

25 A Correct.

1 PHILIP JOHNSON

2 Q So it would be anything else that doesn't
3 fall within the Smart Balance products as you
4 understood them?

5 A That would be my intention, yes.

6 Q And so you have listed here milk, butter,
7 eggs, mayo, peanut butter, etc.

8 What other products did you include in that
9 grouping?

10 A Well, it would have been if they said
11 something like Nature's Balance, they would be in
12 there also.

13 Q But didn't you just say that you didn't --
14 that they didn't need to say the Smart Balance
15 brand?

16 A They didn't need to say Nature's Balance,
17 but if they said Nature's Balance, they would be
18 included in there. You can look at the code sheet
19 and see exactly what everybody said.

20 Q So looking at the code sheet, there would
21 be a list of every single product that you placed
22 into these --

23 A A verbatim response to exactly what they
24 said.

25 Q So just to confirm, these products that are

1 PHILIP JOHNSON

2 listed as Smart Balance products, the people didn't
3 say Smart Balance milk, Smart Balance butter?

4 A Not necessarily. They might have said
5 Smart Balance margarine or something, but most of
6 them did not, based on my recollection.

7 Q And looking at relationship question
8 paragraph 31 of your report. In response to
9 question 4-A, 3 percent of the 13 percent who have a
10 belief believe that Smart Balance is related to,
11 associated with, or has a licensing agreement with
12 Weight Watchers?

13 A That's correct.

14 Q And you're aware that many Smart Ones
15 products exhibit the Weight Watchers mark?

16 A That's my understanding.

17 Q Okay. Are you aware of any Smart Balance
18 products that exhibit the Weight Watchers mark?

19 A I'm not aware of any.

20 Q Earlier when we talked about methodologies
21 you said -- that you use in your surveys, you said
22 that nine out of ten times you use the Ever Ready
23 format?

24 A Yes.

25 Q And the one out of ten time that you don't

1 PHILIP JOHNSON

2 use the Ever Ready, what type of survey do you use?

3 A Well, it would be some variant on a squirt
4 test.

5 Q And is the squirt design generally
6 accepted?

7 MR. CROSS: Objection to form.

8 A That's a good question. It's heavily
9 criticized in most instances because it's a leading
10 and suggestive design that's -- for example, the
11 choice of control is always a much bigger issue on a
12 squirt test than an Ever Ready test because of the
13 leading nature of it, for example. That's just one
14 of the issues, but you're artificially bringing two
15 things together, so.

16 BY MR. MEACHAM:

17 Q If two products, you know, are the same, as
18 in they're the same frozen food meal or that they
19 are similar frozen food meals and they are in the
20 same supermarket section, is that considered
21 artificial to you? Would that be artificial to put
22 those products together?

23 A No. What's artificial is about them is to
24 bring something together, it's suggestive and
25 artificial when you bring together two particular

PHILIP JOHNSON

products because you've matched them up. The consumer hasn't.

Q Are there ways to control for that?

A Theoretically, there's always ways to control for many biases.

Q And how would you control against that?

A It's what I was saying a moment ago. It depends on your -- your choice of controls are always a much bigger deal when you do that.

Q So you've used the squirt test before?

A I have. Some variant of it.

Q And have you used it in preparing reports for litigation?

A Yes, I have.

Q Have you presented it to federal courts?

A I have.

Q And the TTAB?

A Not TTAB.

Q You've never presented a squirt test to the TTAB?

A I don't think so.

Q Do you know for sure or do you not recall?

A I'm pretty sure.

Q Okay. Your survey used open ended

1 PHILIP JOHNSON

2 questions, right?

3 A Well, it uses structured questions and open
4 ended questions.

5 Q Okay. But structured in that, based on the
6 respondent's response, then you -- that dictates how
7 you proceed with the next question, correct?

8 A Yes. In each case they're asked their
9 beliefs before you go on to another question and the
10 basis for their beliefs.

11 Q Okay. And when you ask somebody about the
12 basis of their beliefs, that's an open ended
13 question, correct?

14 A Yes. Typically.

15 Q Have you ever used closed ended questions
16 in a survey such as this?

17 MR. CROSS: Objection to form.

18 A None come to mind.

19 BY MR. MEACHAM:

20 Q And is there a reason why?

21 A When you do -- when do you do closed ended
22 questions? The closed ended questions tend to be
23 used in survey designs like Teflon tests which are
24 used for genericness where you present a term and
25 you ask someone whether the term is a common word or

1 PHILIP JOHNSON

2 a brand. That's a closed ended question.

3 So in litigation that's the kind of survey
4 that uses close ended questions. Surveys that have
5 to do with conclusion always -- in most of my
6 experience, always use open ended questions.

7 Q So in your experience, you can't recall an
8 instance where you've used a closed ended question
9 to produce a survey such as --

10 A As I say, it's not part of the design of a
11 confusion survey.

12 MR. MEACHAM: Okay. I think that's all I have.

13 MR. CROSS: I have no questions. And I'd like
14 Mr. Johnson to have the right to read and sign,
15 please.

16 (Whereupon at 12:09 p.m. the
17 taking of the instant deposition
18 ceased and signature of the witness as
19 reserved.)
20
21
22
23
24
25

PHILIP JOHNSON
 IN THE UNITED STATES PATENT AND
 TRADEMARK OFFICE BEFORE THE
 TRADEMARK TRIAL AND APPEAL BOARD

PROMARK BRANDS, INC., and)
 H.J. HEINZ COMPANY,)
)
 Opposers,)Opposition
)No.
 vs.)91194974
)and
 GFA BRANDS, INC.,)91196358
)
 Applicant.)

I, PHILIP JOHNSON, having first been duly
 sworn, under oath, state that I have read the
 foregoing transcript of the testimony given by me at
 my deposition on the 18th day of December, 2012, and
 that said transcript constitutes a true and correct
 record of the testimony given by me at said
 deposition, except as I have so indicated on the
 errata sheets provided herein for such.

By: _____
 PHILIP JOHNSON

No corrections (please initial): _____

Number of errata sheets submitted: _____

SUBSCRIBED AND SWORN TO
 before me this ____ day
 of _____, 2012.

 NOTARY PUBLIC

1 PHILIP JOHNSON

2 STATE OF ILLINOIS)

3 COUNTY OF C O O K)

4
5 I, TRICIA J. FLASKA, Certified Shorthand
6 Reporter No. 084-004472 in and for the State of
7 Illinois, do hereby certify that previous to the
8 commencement of the examination, said witness was
9 duly sworn by me to testify the truth; that the said
10 deposition was taken at the time and place
11 aforesaid; that the testimony given by said witness
12 was reduced to writing by means of shorthand and
13 thereafter transcribed into typewritten form; and
14 that the foregoing is a true, correct and complete
15 transcript of my shorthand notes so taken as
16 aforesaid.

17 I further certify that there were present
18 at the taking of the said deposition the persons and
19 parties as indicated on the appearance page made a
20 part of this deposition.

21 I further certify that I am not Counsel
22 for nor in anyway related to any of the parties to
23 this action, nor am I in anyway interested in the
24 outcome thereof.

25

PHILIP JOHNSON

I further certify that this certificate
applies to the original signed IN BLUE and certified
transcripts only. I assume no responsibility for
the accuracy of any reproduced copies not made under
my control or direction. DATED: 12-18-12

Tricia Flaska

TRICIA J. FLASKA, CSR, RPR

My Commission Expires
August 11, 2015

1 NAME OF CASE:

2 DATE OF DEPOSITION:

3 NAME OF WITNESS:

4 Reason Codes:

5 1. To clarify the record.

6 2. To conform to the facts.

7 3. To correct transcription errors.

8 Page _____ Line _____ Reason _____

9 From _____ to _____

10 Page _____ Line _____ Reason _____

11 From _____ to _____

12 Page _____ Line _____ Reason _____

13 From _____ to _____

14 Page _____ Line _____ Reason _____

15 From _____ to _____

16 Page _____ Line _____ Reason _____

17 From _____ to _____

18 Page _____ Line _____ Reason _____

19 From _____ to _____

20 Page _____ Line _____ Reason _____

21 From _____ to _____

22 Page _____ Line _____ Reason _____

23 From _____ to _____

24 _____

25 _____

EXHIBIT G

**IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

**PROMARK BRANDS INC., and
H.J. HEINZ COMPANY,**

Opposers,

v.

GFA BRANDS, INC,

Applicant.

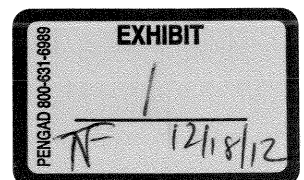
) **Opposition No. 91194974 (Parent)**
) **and Opposition No. 91196358**
)
) U.S. Trademark Application 77/864,305
) For the Mark **SMART BALANCE**
) Published in the Official Gazette
) on April 20, 2010
)
) U.S. Trademark Application 77/864,268
) For the Mark **SMART BALANCE**
) Published in the Official Gazette
) on August 10, 2010
)

NOTICE OF DEPOSITION OF PHILIP JOHNSON

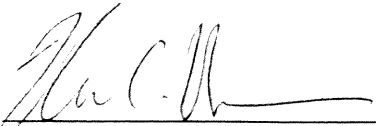
TO: COUNSEL OF RECORD

PLEASE TAKE NOTICE that pursuant to Rule 2.120 *et seq.* of the Trademark Rules of Practice and the Federal Rules of Civil Procedure, ProMark Brands Inc. and H. J. Heinz Company shall take the deposition of Philip Johnson upon oral examination. The deposition will commence on Tuesday, December 18, 2012 at 9:30 a.m. at the offices of Jones Day, 77 West Wacker, Chicago, Illinois 60601, and will continue from day to day thereafter.

The deposition will be an oral examination taken before an officer duly authorized by law to take testimony and administer oaths and will continue from day to day, excluding Saturdays, Sundays, and holidays, until completed. The testimony will be recorded by stenographic means and may be recorded by sound and visual means. The stenographic means may include the use of an instant visual display of the deposition transcripts. The testimony so obtained will be used for all purposes permitted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure.



Dated: December 12, 2012

By: _____

Kevin C. Meacham
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Attorneys for Opposers

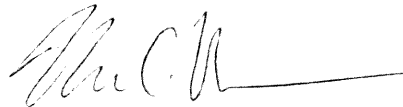
CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2012, the foregoing document is being served this day on counsel of record identified via First Class U.S. Mail, with a courtesy copy sent via email to the following counsel of record:

Marta S. Levine
David R. Cross
Johanna M. Wilbert
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Marta.levine@quarles.com
David.cross@quarles.com
Johanna.wilbert@quarles.com

Attorneys for Applicant

A handwritten signature in black ink, appearing to read 'Kevin C. Meacham', is written over a horizontal line.

Kevin C. Meacham

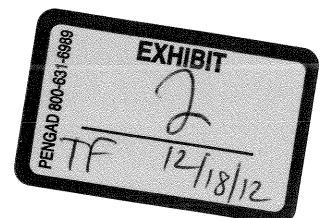
Counsel for Opposers

ESTTA Tracking number: **ESTTA469771**

Filing date: **04/30/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Defendant GFA Brands, Inc.
Correspondence Address	MARTA LEVINE QUARLES BRADY LLP 411 EAST WISCONSIN AVE MILWAUKEE, WI 53202 UNITED STATES marta.levine@quarles.com, david.cross@quarles.com
Submission	Other Motions/Papers
Filer's Name	David R. Cross
Filer's e-mail	david.cross@quarles.com
Signature	/s/ David R. Cross
Date	04/30/2012
Attachments	Johnson.pdf (57 pages)(1272753 bytes)



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS, INC.,))	Opposition Nos. 91194974 and 91196358
)	
Opposer,)	U.S. Trademark Application 77/864,305
)	For the Mark SMART BALANCE
vs.)	Published in the Official Gazette
)	On April 20, 2010
GFA BRANDS, INC.,)	
)	U.S. Trademark Application 77/864,268
Applicant.)	For the Mark SMART BALANCE
)	Published in the Official Gazette
)	On August 10, 2010

GFA BRANDS, INC.'S DISCLOSURE OF EXPERT, PHILIP JOHNSON

Pursuant to Fed. R. Civ. P. 26(a)(2) and 37 C.F.R. § 2.120, GFA Brands, Inc. hereby discloses Philip Johnson as a witness who may be used to present expert testimony in the above-captioned matter. An expert report and the other required disclosures are set forth in the attachment, which was served on Counsel for Opposer on Saturday, April 28, 2012.

Dated this 30th day of April, 2012.

By: /s/David R. Cross
David R. Cross
Marta S. Levine
Johanna M. Wilbert
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ATTORNEYS FOR APPLICANT
GFA Brands, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing GFA Brands, Inc. Disclosure of Expert Philip Johnson was served on this 30th day of April 2012, via regular U.S. Mail, with e-mail courtesy copies upon:

Timothy P. Fraelich
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Cecilia R. Dickson
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Pittsburgh PA 15219
crdickson@JonesDay.com

/s/ David R. Cross
Attorney for Applicant



PROMARK BRANDS, INC.

(OPPOSER)

VS.

GFA BRANDS, INC.

(APPLICANT)

A STUDY OF LIKELIHOOD OF CONFUSION

April 2012

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APPENDIX A

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified

APPENDIX B

- Questionnaire
- Interviewing Instructions
- Exhibits

APPENDIX C

- Validation Summary

APPENDIX D

- Verbatim from Respondents Who Identify Weight Watchers

REPORT OF PHILIP JOHNSON

I, Philip Johnson, state as follows:

I. BACKGROUND

1. I am Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a Chicago-based market research and consulting firm that conducts surveys.
2. I have been with this firm since 1971. Over the past 41 years, I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), the American Intellectual Property Law Association (AIPLA), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases in which I have offered survey evidence during the past four years are attached to Appendix A of this Report.

II. INTRODUCTION

3. During February 2012, I was contacted by counsel from the law firm, Quarles & Brady LLP. I was formally retained on behalf of its client, GFA Brands, Inc. ("GFA") pursuant to an engagement letter dated March 1, 2012. Counsel informed me of a dispute that has arisen between GFA and ProMark Brands Inc. ("ProMark").
4. This dispute concerns GFA's intent-to-use applications in the U.S. Patent and Trademark Office to register the term SMART BALANCE in connection with frozen meals, among other products. It is my understanding that ProMark opposes GFA's applications alleging that consumers who encounter Smart Balance frozen meal products may falsely believe that they come from or are related to Smart Ones.
5. Counsel asked whether I could design and conduct a study that would measure the extent, if any, to which the Smart Balance name that has been objected to by ProMark, is or is not likely to cause confusion when relevant consumers are exposed to it in connection with frozen meal products. I agreed and proceeded to design and conduct such a study. What follows is a report on the design, execution, results, and conclusions that one can draw from this research.

III. METHODOLOGY

6. Personal interviews were conducted between March 8 and 19, 2012 with 410¹ adults who are current or prospective purchasers of frozen meal products. These personal interviews were conducted in shopping mall-based research facilities located in 8 markets geographically distributed throughout the United States.

7. Specifically, interviewing was conducted in each of the four major U.S. Census Regions, as follows:

<u>NORTHEAST</u>	<u>SOUTH</u>	<u>MIDWEST</u>	<u>WEST</u>
New York, NY	Dallas, TX	Minneapolis, MN	Seattle, WA
Philadelphia, PA	Atlanta, GA	Chicago, IL	San Francisco, CA

8. The survey employed a “test” cell and a “control” cell. Each respondent was randomly assigned to either the test cell (i.e., viewed only the test cell exhibit) or the control cell (i.e., viewed only the control cell exhibit). One-half of the interviews were conducted in the test cell (205 cases), while the other half of the interviews were conducted in the control cell (205 cases).
9. Test cell respondents were exposed to an exhibit card bearing the name “SMART BALANCE,” while control cell respondents were exposed to an exhibit card bearing the name “RIGHT BALANCE” in all capital letters. I selected “RIGHT BALANCE” as the

¹ A total of 414 interviews were conducted. However, four of these interviews have been excluded from the database due to failure in the validation process, leaving a total of 410 qualifying interviews. ID numbers for these 4 invalid interviews are #23, #42, #311, and #333.

control cell name because it is similar in meaning, but does not utilize the disputed word “SMART.”

10. Reduced size images of the exhibit cards are shown below:

Test Cell Exhibit

SMART BALANCE

Control Cell Exhibit

RIGHT BALANCE

11. This approach of using both a test cell and control cell is the preferred survey methodology because there is a certain amount of error in any survey measurement that can be caused by sample error, guessing, the design of the study, or the construction of the questions asked. It is important to exclude these forms of error from the study results when assessing the degree of confusion that may be present. Specifically, the methodology used in this study allows one to accurately isolate and assess the effects of the alleged infringing word mark at issue when measuring any possible likelihood of confusion. Operationally, this is accomplished by taking the proportion of test cell respondents who falsely identify Smart Ones as the source or related source when shown the Smart Balance name in connection with frozen meals and then subtracting the corresponding proportion of control cell respondents who similarly falsely identify Smart Ones as the source or related source when shown the Right Balance name in connection with frozen meals.
12. During the course of the interview, each respondent was asked who they believe is the source and whether they believe the source is related to, associated with, or has a licensing agreement with any other brands, products, or companies. In order to understand the basis for their beliefs as well as exactly what company they are referring to, respondents were then asked open-ended questions that allowed them to explain their answers in their own words and clarify each survey response.

13. This methodology follows the general pattern of the “Eveready” test, which is frequently used to measure likelihood of confusion. This design produces a very direct measure of confusion as to source or relationship.
14. In disputes about likelihood of confusion, the appropriate universe for the survey is the junior user’s market. In his treatise, Dr. Thomas McCarthy states that when designing a study to measure likelihood of confusion, the proper universe is potential consumers of the junior user’s goods or services:²

In a traditional case claiming “forward” confusion, not “reverse” confusion, the proper universe to survey is the potential buyers of the junior user’s goods or services.

15. In order to reach the relevant universe, interviews were conducted with current and prospective consumers of frozen meal products. Specifically, qualified respondents were adults who are responsible for all or some of the grocery shopping for their household and have either purchased frozen meals in the past month for themselves or their household or plan to purchase frozen meals for themselves or their household in the next month.
16. In order to qualify, respondents must have also met all of the following criteria:
 - Must not have participated in any market research survey in the past three months.
 - The respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor, or retailer of frozen food; or a store in the mall where the interviewing took place.

² McCarthy, J. Thomas. McCarthy on Trademarks and Unfair Competition, Volume 5, 32:159, pg. 32-249. 2001.

- Must be wearing his/her eyeglasses or contact lenses at the time of the interview if he/she usually wears them when shopping or reading.

17. The screening interview proceeded as follows:

Question I:

"Before we begin, what is your age?"

Question II:

"RECORD GENDER FROM OBSERVATION:"

Question III:

"What proportion of the grocery shopping are you personally responsible for in your household? READ FIRST THREE ALTERNATIVES:

...ALL OF IT

...SOME OF IT

...NONE

...IF SPONTANEOUS: DON'T KNOW"

Question IVa:

"Thinking about the past month, have you personally purchased... (ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?

...ice cream?

...frozen meals?

...frozen juice?"

Question IVb:

"Thinking about the next month, do you personally plan to purchase... (ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?

...ice cream?

...frozen meals?

...frozen juice?"

Question V:

"Have you participated in any market research survey in the past three months?"

Question VI:

"Do you, or does any member of your household, work for... (ASK FOR EACH)?

...a market research or advertising firm?

...a manufacturer, distributor, or retailer of frozen food?

...a store in this mall?"

Question VIIa:

"Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?"

Question VIIb:

"IF 'YES' IN Q.VIIa, ASK: Before continuing, would you please put them on?"

Question VIII:

"I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out?"

18. Each screened and qualified respondent was escorted to a private room in the interviewing facility to conduct this interview.

19. Respondents were asked to be seated and then told:

"Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess."

20. Qualified respondents were then handed either the test cell exhibit or the control cell exhibit and told:

"HAND RESPONDENT EXHIBIT CARD. SAY: This is the name of a frozen meal product that you might see in the frozen food section of a grocery store. Feel free to comment, if you wish, on anything about this. RECORD ANY SPONTANEOUS COMMENTS MADE."

21. Once the respondent was done looking at the exhibit, the interviewer was instructed to take it away and put it out of sight for the remainder of the interview.
22. The exact questions used in the interview, and the sequence in which they occurred are as follows:

Question 2a:

"Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?"

Question 2b:

*"What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*

Question 3a:

*"What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?"*

Question 3b:

"ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a: What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the frozen meal product with the name that I showed you? PROBE: Anything else?"

Question 4a:

"What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? PROBE: Any others?"

Question 4b:

"ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a: What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you? PROBE: Anything else?"

23. Finally, classification information was secured and the interview completed. Copies of the questionnaire, interviewing instructions, and exhibits used are attached to Appendix B of this Report.
24. Based on the sample size of 205 cases per cell, the statistical error rate for the key measures in this study falls into the range of $\pm 4.1\%$ for a statistic such as 10% at the 95% confidence level. In other words, one would expect that 95 times out of 100, a measurement that was actually 10%, would accurately be represented in the data by a statistic as high as 14.1%, or as low as 5.9%.

25. Interviewing was administered and supervised, under my direction, by Survey Center, L.L.C., a company that specializes in the administration of market research surveys. Survey Center is the data collection division of Leo J. Shapiro and Associates and is a member of the Market Research Association. Interviewing in each market was conducted by independent research firms who specialize in personal interviewing in shopping malls. Interviewers in each market were trained in proper interviewing techniques and were briefed specifically on this project.
26. The survey used a “double-blind” approach, where neither the respondent nor the interviewers conducting the study were aware of the purpose of the research or the identity of the party who commissioned it. The methodology, survey design, execution, and reporting were all conducted in accordance with generally accepted standards of objective procedure and survey technique.
27. Independent validation was conducted by telephone, which involved re-establishing contact with the persons who were interviewed in the study. Based on this re-contact, overall, four of the 414 interviews failed during the validation procedure, leaving a total of 410 qualifying interviews. These four interviews have been excluded from the study sample, and there is no significant change in any of the study results based on this exclusion. A detailed summary of the survey validation is attached to Appendix C of this Report.

28. The work performed to design, carry out, and report this study is covered by a billing of \$100,000. Additional time required for trial testimony or deposition, will be billed at a rate of \$7,000 per day, plus expenses.

IV. RESULTS

Source Question

29. Only 1% of test cell respondents (i.e., 2 individuals) report the false belief that Smart Ones is the source of a frozen meal product called Smart Balance. None of the control cell respondents name Smart Ones in response to this question.

Question 2a:

"Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?"

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
	(205)	(205)
ALL RESPONDENTS	<u>100%</u>	<u>100%</u>
<u>All Who Have A Belief About Source:</u>	<u>27%</u>	<u>28%</u>
Smart Balance	4	*
Lean Cuisine	3	5
Weight Watchers	3	5
Healthy Choice	3	3
Stouffer's/Corner Bistro	2	1
Name Frozen Food Products	1	--
Smart Ones	1	--
Banquet	*	2
Jenny Craig	*	1
Tyson	--	2
Right Balance	--	1
Other**	7	7
<u>Don't Have A Belief About Source:</u>	<u>73</u>	<u>72</u>

* 0.5% or fewer mentions.

** Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Related Products or Brands Question

30. In addition, there is one test cell respondent (0.5%) who reports the false belief that Smart Ones is a related product or brand. None of the control cell respondents name Smart Ones in response to this question.

Question 3a:

*“What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?”*

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
ALL RESPONDENTS	(205) <u>100%</u>	(205) <u>100%</u>
<u>All Who Have a Belief About Related Products/Brands:</u>	<u>18%</u>	<u>13%</u>
Grocery Products	5	1
Smart Balance Products (e.g., milk, butter, eggs, mayo, peanut butter, etc.)	5	1
Lean Cuisine	2	2
Stouffer's/Corner Bistro	2	2
Frozen Meals	2	1
Frozen Food Products	2	--
Healthy Choice	1	1
South Beach Diet	1	*
Weight Watchers	*	2
Smart Choice	*	1
Smart Ones	*	--
Banquet	--	2
Other**	3	4
<u>Don't Have A Belief About Related Products/Brands:</u>	<u>82</u>	<u>87</u>

* 0.5% or fewer mentions.

** Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Relationship Question

31. Finally, one test cell respondent (0.5%) reports the false belief that Smart Balance is related to, associated with, or is licensed by Smart Ones. None of the control cell respondents name Smart Ones in response to this question.

Question 4a:

*"What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?"*

	EXHIBIT SHOWN	
	<u>SMART</u> <u>BALANCE</u>	<u>RIGHT</u> <u>BALANCE</u>
	(205)	(205)
ALL RESPONDENTS	<u>100%</u>	<u>100%</u>
<u>All Who Have a Belief About Related Source:</u>	<u>13%</u>	<u>9%</u>
Weight Watchers	3	1
Lean Cuisine	2	2
Healthy Choice	2	1
Jenny Craig	1	*
Kraft	1	*
Hungry Man	1	*
Special K	1	--
Swanson	*	*
Dannon/Activia	*	*
Smart Ones	*	--
Smart Balance	--	*
Other**	4	4
<u>Don't Have A Belief About Related Source:</u>	<u>87</u>	<u>91</u>

* 0.5% or fewer mentions.

**Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Confusion Summary Table for “Smart Ones”

32. When the results to all survey questions relating to source, related products/brands, and relationship are considered together on an unduplicated basis, just 2% of test cell respondents report the false belief that Smart Ones is the source or a related source when they are exposed to the Smart Balance name in connection with frozen meals. This 2% statistic is below the standard error rate for the survey ($\pm 4.1\%$) such that it is not significant. None of the control cell respondents report the false belief that Smart Ones is the source or a related source when they are exposed to the Right Balance name in connection with frozen meals.

		<u>EXHIBIT SHOWN</u>	
		<u>SMART</u>	<u>RIGHT</u>
		<u>BALANCE</u>	<u>BALANCE</u>
		(205)	(205)
		<u>100%</u>	<u>100%</u>
ALL RESPONDENTS	<u>Total “Smart Ones” Identification (Net):</u>	<u>2%</u>	<u>--%</u>
	In Source Question	1	--
	In Related Products/Brands, But Not Source Question	*	--
	In Relationship, But Not Source or Related Products/Brands Questions	*	--
<u>Adjusted Findings</u>			
Adjusted Net of Test – Control		2%	- 0% = 2%

* 0.5% or fewer mentions.

33. When asked to explain the reasons for their belief, those test cell respondents (n=4) who report the false belief that Smart Ones is the source or a related source of a frozen meal called Smart Balance give the following reasons:

Question 2b/3b/4b:

"What makes you say that?"

ID 00231

Source Qstn: Smart Ones. Because they make diet food and it has "smart" in the name.

ID 00413

Spontaneous Comments: It resembles the name Smart Ones.

Source Qstn: Smart Ones. Because of the similarity of the names.

ID 00083

Related Products Qstn: Smart Ones. How it was displayed.

ID 00100

Relationship Qstn: Smart Ones. I saw it at the store. It just had the name Smart Balance on there. They make the best quality dinners for Smart Ones if you want to lose weight. Really good stuff.

“Weight Watchers” Analysis

34. It is my understanding that the Weight Watchers brand is also present on most, if not all, of the Smart Ones products. Given this dispute, it is prudent to consider whether Weight Watchers mentions significantly vary when comparing test cell and control cell results. It is also important to consider whether these Weight Watchers mentions are based in any way on consumer knowledge of the Smart Ones brand.
35. When the results to all survey questions are considered together on an unduplicated basis, just 6% of test cell respondents report the false belief that Weight Watchers is the source or a related source when they are exposed to the Smart Balance name in connection with frozen meals. Similarly, 7% of control cell respondents report the false belief that Weight Watchers is the source or a related source when they are exposed to the Right Balance name in connection with frozen meals. When the control cell result is subtracted from the test cell result, it yields a zero result (6% - 7% = -1%).

		EXHIBIT SHOWN	
		<u>SMART</u>	<u>RIGHT</u>
		<u>BALANCE</u>	<u>BALANCE</u>
		(205)	(205)
		100%	100%
ALL RESPONDENTS	<u>Total “Weight Watchers” Identification (Net):</u>	<u>6%</u>	<u>7%</u>
	In Source Question	3	5
	In Related Products/Brands, But Not Source Question	*	1
	In Relationship, But Not Source or Related Products/Brands Questions	3	1
<u>Adjusted Findings</u>			
	Adjusted Net of Test – Control	6%	- 7% = 0% (-1%)

* 0.5% or fewer mentions.

36. Hence, there is no significant difference between the test cell and the control cell for Weight Watchers mentions. Further, the Weight Watchers mentions that occur are not related to the names at issue (i.e., Smart Balance and Smart Ones), but generally reflect the similarity in health and diet-conscious product offerings from Smart Balance and Weight Watchers.³
37. In fact, respondents name other frozen meal brands who compete with Weight Watchers in this genre at a similar level that they name Weight Watchers (e.g., Lean Cuisine mentioned by 7% test cell respondents and 10% control cell respondents; Healthy Choice mentioned by 6% test cell respondents and 5% control cell respondents).

³ Verbatim comments for respondents who identify Weight Watchers are attached to Appendix D of this Report.

V. CONCLUSIONS AND OPINIONS

38. Based on the results of this research, when current or prospective purchasers of frozen meals are exposed to the Smart Balance word mark in connection with frozen meals, there is no significant likelihood of confusion that these consumers will falsely believe this frozen meal comes from or is related to Smart Ones.
39. Moreover, even when considering Weight Watchers mentions, rather than the Smart Ones mark at issue, there is no likelihood of confusion.
40. Overall, it is my opinion that GFA's use of the Smart Balance name in connection with frozen meals causes no likelihood of confusion with Smart Ones frozen meals.

Pursuant to 28 U.S.C., Section 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 26, 2012 at Chicago, Illinois.

A handwritten signature in cursive script, appearing to read "Philip Johnson", is written over a horizontal line.

Philip Johnson

APPENDIX A

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified



PHILIP JOHNSON

CURRICULUM VITAE

Philip Johnson is the Chief Executive Officer of Leo J. Shapiro and Associates, a Chicago-based market research and behavioral consulting company. Mr. Johnson has been with this firm since 1971 and has held a number of positions. In recent years, he has concentrated his efforts in the areas of study design and the development of innovative research techniques.

Over the past years, Mr. Johnson has designed and supervised hundreds of surveys measuring consumer behavior and opinion, employing a wide range of research techniques. His area of expertise is in the use of survey research as a tool in litigation, including jury selection and trademark disputes.

Mr. Johnson has offered testimony regarding survey evidence on over fifty occasions in both Federal and State courts. In addition, he has offered survey research in matters before the Federal Trade Commission, The Food and Drug Administration, the Patent and Trademark Office, and the Trademark Trial and Appeal Board. Mr. Johnson has designed, conducted, and reported survey evidence on behalf of both plaintiffs and defendants in various cases. The topics covered in these litigation related surveys include matters related to likelihood of confusion, secondary meaning, genericness, dilution, false advertising, change of venue, and unfair competition.

Part of Mr. Johnson's training has been through working with Dr. Leo J. Shapiro, the Founder of the company; the late Dr. Philip M. Hauser, a former Director of the U. S. Census Bureau; and the late

Dr. Hans Zeisel, who made significant contributions in the application of social science to the solution of legal questions.

Mr. Johnson has given lectures before the American Bar Association (ABA) and the Practising Law Institute (PLI) on the use of survey research in litigation. He is a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA).

Mr. Johnson has a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago.



**RECENT CASES IN WHICH PHILIP JOHNSON HAS
TESTIFIED OR OFFERED SURVEY EVIDENCE AT TRIAL...**

NOVEMBER 2009	FAIR ISAAC CORPORATION v. EQUIFAX, INC., ET AL. United States District Court for the District of Minnesota Secondary Meaning
JULY 2009	THE SCOTTS COMPANY LLC v. CENTRAL GARDEN & PET COMPANY AND GULFSTREAM HOME & GARDEN, INC., United States District Court for the Southern District of Ohio False Advertising
JULY 2009	LUMBER LIQUIDATORS, INC., v. STONE MOUNTAIN CARPET MILLS, INC. d/b/a THE FLOOR TRADER United States District Court for the Eastern District of Virginia Likelihood of Confusion
NOVEMBER 2008	BRIGHTON COLLECTIBLES, INC. v. COLDWATER CREEK, INC. United States District Court for the Southern District of California Secondary Meaning
OCTOBER 2008	EL DIABLO, INC. v. MEL-OPP & GRIFF, LLC., ET AL. In the Superior Court of the State of Washington in and for the County of King Trade Dress Infringement
AUGUST 2008	EXPERIENCE HENDRIX, LLC. AND AUTHENTIC HENDRIX, LLC., v. ELECTRIC HENDRIX, LLC., ET AL. United States District Court for the Western District of Washington at Seattle Likelihood of Confusion
JANUARY 2008	PEDINOL PHARMACAL, INC. v. RISING PHARMACEUTICALS, INC. United States District Court for the Eastern District of New York Therapeutic Equivalence

NOVEMBER 2007	<p>SKECHERS U.S.A., INC. v. VANS, INC. United States District Court for the Central District of California Likelihood of Post-Sale Confusion</p>
AUGUST 2007	<p>SAINT-GOBAIN CORPORATION v. 3M COMPANY United States Patent and Trademark Office Trademark Trial and Appeal Board Secondary Meaning</p>
APRIL 2007	<p>NIKE, INC. v. NIKEPAL INTERNATIONAL, INC. United States District Court for the Eastern District of California Likelihood of Initial Interest Confusion and Dilution</p>
FEBRUARY 2007	<p>JOHNSON & JOHNSON VISION CARE, INC. v. CIBA VISION CORPORATION United States District Court for the Southern District of New York False Advertising</p>
NOVEMBER 2006	<p>HASBRO, INC. v. MGA ENTERTAINMENT, INC. United States District Court for the District of Rhode Island Secondary Meaning</p>
OCTOBER 2006	<p>CLASSIC FOODS INTERNATIONAL CORPORATION v. KETTLE FOODS, INC. United States District Court for the Central District of California (Southern Division) Likelihood of Confusion</p>
JUNE 2006	<p>GROCERY OUTLET INC. v. ALBERTSON'S, INC., AMERICAN STORES COMPANY, L.L.C., AND LUCKY STORES, INC. United States District Court for the Northern District of California (San Francisco Division) Likelihood of Confusion and Fame</p>
JUNE 2006	<p>DE BEERS LV TRADEMARK LTD. AND DE BEERS LV LTD. v. DEBEERS DIAMOND SYNDICATE INC. AND MARVIN ROSENBLATT United States District Court for the Southern District of New York Awareness</p>
APRIL 2006	<p>24 HOUR FITNESS USA, INC. v. 24/7 TRIBECA FITNESS, L.L.C., 24/7 GYM, L.L.C., ET AL. United States District Court for the Southern District of New York Likelihood of Confusion</p>

APRIL 2006	JUICY COUTURE, INC. AND L.C. LICENSING, INC. v. LANCÔME PARFUMS ET BEAUTE & CIE AND LUXURY PRODUCTS, L.L.C. United States District Court for the Southern District of New York Likelihood of Confusion
JANUARY 2006	WHIRLPOOL PROPERTIES, INC., ET AL., v. LG ELECTRONICS U.S.A., INC., ET AL. United States District Court for the Western District of Michigan (Southern Division) Likelihood of Confusion
OCTOBER 2005	PRL USA HOLDINGS, INC. v. UNITED STATES POLO ASSOCIATION, ET AL. United States District Court for the Southern District of New York Likelihood of Confusion
SEPTEMBER 2005	HILL'S PET NUTRITION, INC. v. NUTRO PRODUCTS, INC. AND JOHN DOES #1-20 United States District Court for the Central District of California (Western Division) False Advertising
SEPTEMBER 2005	PERFUMEBAY.COM, INC. v. EBAY, INC. United States District Court for the Central District of California (Western Division) Likelihood of Dilution and Initial Interest Confusion
JUNE 2005	METROPOLITAN LIFE INSURANCE CORPORATION v. METBANK United States District Court for the Southern District of New York Likelihood of Confusion
MARCH 2005	PACIFIC MARKET INTERNATIONAL v. THERMOS L.L.C. United States District Court for the Western District of Washington (Seattle Division) Likelihood of Confusion
MARCH 2005	JADA TOYS, INC. v. MATTEL, INC. United States District Court for the Central District of California Likelihood of Confusion



**DEPOSITION TESTIMONY OF PHILIP JOHNSON
THAT HAS NOT BEEN OFFERED AT TRIAL...**

NOVEMBER 2011	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
AUGUST 2011	MCDONALD'S CORPORATION v. MCSWEET, LLC United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
APRIL 2011	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
JANUARY 2011	TECHNOLOGY PATENTS LLC v. DEUTSCHE TELEKOM AG, ET AL United States District Court for the District of Maryland
DECEMBER 2010	BLAIN SUPPLY, INC. v. RUNNING SUPPLY, INC. United States District Court for the Western District of Wisconsin
DECEMBER 2010	LUCENT TECHNOLOGIES, INC. v. MICROSOFT CORPORATION United States District Court for the Southern District of California
JULY 2010	ROSETTA STONE LTD. v. TOPICS ENTERTAINMENT, INC. United States District Court for the Eastern District of Virginia
APRIL 2010	LA QUINTA WORLDWIDE, LLC v. QUINTA REAL PROMOCION, S.A. de C.V. United States District Court for the District of Arizona (Tucson Division)
MARCH 2010	THE NORTH FACE APPAREL CORPORATION v. THE SOUTH BUTT, LLC United States District Court for the Eastern District of Missouri (St. Louis)

MARCH 2010	THINK VILLAGE-KIWI, LLC v. ADOBE SYSTEMS, INC., AND ADOBE MACROMEDIA SOFTWARE LLC United States District Court for the Northern District of California
SEPTEMBER 2009	FLOWERS BAKERIES BRANDS, INC. v. INTERSTATE BAKERIES CORPORATION United States District Court for the Northern District of Georgia
FEBRUARY 2009	CRICKET COMMUNICATIONS, INC. v. HIPCRICKET, INC. United States District Court for the Western District of Washington
APRIL 2008	SEXY HAIR CONCEPTS, LLC v. VICTORIA'S SECRET STORES BRAND MANAGEMENT, INC. United States District Court for the Southern District of New York
APRIL 2007	IDT TELECOM, INC. AND UNION TELECARD ALLIANCE, LLC v. CVT PREPAID SOLUTIONS, INC., ET AL. United States District Court for the District of New Jersey
NOVEMBER 2006	STATIC CONTROL COMPONENTS, INC. AND WAZANA BROTHERS INTERNATIONAL, INC. D/B/A MICRO SOLUTIONS ENTERPRISES v. LEXMARK INTERNATIONAL, INC. United States District Court for the District of Columbia

APPENDIX B

- Questionnaire
- Interviewing Instructions
- Exhibits

QUESTIONNAIRE

Hello, my name is _____. I work for Survey Center, and we are doing an opinion study. Let me assure you that we are not selling anything. This is strictly for research purposes only.

SCREEN:

I. Before we begin, what is your age? **RECORD AGE:** _____

- () UNDER 18 YEARS...**TALLY AND TERMINATE.**
- () BETWEEN 18 AND 34 YEARS...**CHECK SCREENING QUOTAS AND CONTINUE.**
- () BETWEEN 35 AND 54 YEARS...**CHECK SCREENING QUOTAS AND CONTINUE.**
- () 55 YEARS AND OLDER...**CHECK SCREENING QUOTAS AND CONTINUE.**
- () REFUSED...**TALLY AND TERMINATE.**

II. **RECORD GENDER FROM OBSERVATION:**

- () MALE...**CHECK SCREENING QUOTAS AND CONTINUE.**
- () FEMALE...**CHECK SCREENING QUOTAS AND CONTINUE.**

III. What proportion of the grocery shopping are you personally responsible for in your household? **READ FIRST THREE ALTERNATIVES:**

- () ALL OF IT...**CONTINUE.**
- () SOME OF IT...**CONTINUE.**
- () NONE...**TALLY AND TERMINATE.**

IF SPONTANEOUS: () DON'T KNOW...TALLY AND TERMINATE.

RESPONDENT MUST BE PERSONALLY RESPONSIBLE FOR "ALL" OR "SOME" OF THE GROCERY SHOPPING IN THEIR HOUSEHOLD IN ORDER TO QUALIFY FOR INTERVIEW; OTHERWISE, TALLY AND TERMINATE.

IVa. Thinking about the past month, have you personally purchased...(ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?

b. Thinking about the next month, do you personally plan to purchase...(ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?

	IVa. Past Month Purchase?		IVb. Next Month Purchase?	
...ice cream?	() NO	() YES	() NO	() YES
...frozen meals?	() NO	() YES	() NO	() YES
...frozen juice?	() NO	() YES	() NO	() YES

IF RESPONDENT SAYS "NO" TO PURCHASING FROZEN MEALS IN Q.IVa AND Q.IVb, TALLY AND TERMINATE. IN ORDER TO QUALIFY FOR INTERVIEW, RESPONDENT MUST HAVE EITHER PERSONALLY PURCHASED FROZEN MEALS IN THE PAST MONTH OR MUST PLAN TO PERSONALLY PURCHASE FROZEN MEALS IN THE NEXT MONTH.

V. Have you participated in any market research survey in the past three months?

- () NO...**IF NO, CONTINUE.**
- () YES...**IF YES, TALLY AND TERMINATE.**

VI. Do you, or does any member of your household, work for...(ASK FOR EACH)?

...a market research or advertising firm?	() NO	() YES... IF YES, TALLY AND TERMINATE.
...a manufacturer, distributor or retailer of frozen food?	() NO	() YES... IF YES, TALLY AND TERMINATE.
...a store in this mall?	() NO	() YES... IF YES, TALLY AND TERMINATE.

VIIa. Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?

() NO...IF NO, SKIP TO Q.VIII.

() YES...IF YES, CONTINUE WITH Q.VIIb.

b. IF "YES" IN Q.VIIa, ASK: Before continuing, would you please put them on?

() NO...IF NO, TALLY AND TERMINATE.

() YES...IF YES, CONTINUE WITH Q.VIII.

VIII. I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out? () NO...IF NO, TALLY AND TERMINATE. () YES...IF YES, CONTINUE.

QUESTIONNAIRE:

ESCORT RESPONDENT TO INTERVIEWING FACILITY.

SAY: Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess.

ROTATE WHICH EXHIBIT CARD IS SHOWN IN BETWEEN RESPONDENTS.

"X" HERE WHICH EXHIBIT CARD IS SHOWN: () MM () TT

1. HAND RESPONDENT EXHIBIT CARD. SAY: This is the name of a frozen meal product that you might see in the frozen food section of a grocery store. Feel free to comment, if you wish, on anything about this. RECORD ANY SPONTANEOUS COMMENTS MADE.

() NO SPONTANEOUS COMMENTS

WHEN RESPONDENT IS DONE LOOKING AT EXHIBIT CARD, TAKE BACK EXHIBIT CARD, AND PUT IT OUT OF SIGHT FOR THE REMAINDER OF THE INTERVIEW.

- 2a. Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?
- () DON'T HAVE A BELIEF...**SKIP TO Q.3a.**

- b. What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?

- 3a. What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?
- () DON'T HAVE A BELIEF...**SKIP TO Q.4a.**

- b. **ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?

a. What Product or Brand?

b. What Makes You Say That?

4a. What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?

()DON'T HAVE A BELIEF...SKIP TO "CLASSIFICATION PAGE."

b. **ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?

a. What Brand or Company?

b. What Makes You Say That?

CLASSIFICATION PAGE

In order to be counted as a complete survey, I need to have a phone number where you can be reached if a verifier calls to confirm that you participated in the study. May I please have a phone number where you can be reached? This verification call would take less than a minute of your time.

Is this your ()HOME ()BUSINESS or ()CELL phone? Thank you.

NAME: _____ PHONE: _____

ADDRESS: _____ CITY/STATE: _____

ZIP CODE: _____ INTERVIEWER: _____ DATE: _____

FIELD SERVICE: _____ MALL: _____

INTERVIEWER CERTIFICATION

This certifies I have personally conducted this interview with the above named respondent to the best of my ability and in compliance with the interviewing instructions. I have recorded, as fully as possible, the respondent's complete answers to the above questions.

SIGNATURE OF INTERVIEWER: _____

PRINTED NAME OF INTERVIEWER: _____

INTERVIEWING INSTRUCTIONS

Survey Center

Marketing Research

FROZEN FOOD STUDY

INTERVIEWING INSTRUCTIONS

March 2012

Each interviewer working on this job must be briefed by a supervisor. The briefing must consist of having these instructions read in their entirety. The supervisor must then witness each interviewer conducting a practice run-through on the questionnaire.

MATERIALS:

- 104 Hard Copy Screeners
- Terminate Tally Sheet
- Exhibit Cards:
 - Exhibit Card MM
 - Exhibit Card TT

SCREENING CRITERIA

- Respondent must be 18 years of age and older.
- Respondent must be personally responsible for “all” or “some” of the grocery shopping in their household.
- Respondent must have either personally purchased frozen meals in the past month or must plan to personally purchase frozen meals in the next month.
- Respondent must not have participated in any market research survey in the past three months.
- Respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor or retailer of frozen food; or a store in the mall.
- Respondent must be wearing his/her eyeglasses or contact lenses if he/she usually wears them while shopping or reading.

QUOTA

- Your quota is **52** completed interviews divided evenly by exhibit card as shown below.

	Total <u>52</u>
Exhibit MM	26
Exhibit TT	26

- Each respondent sees only one Exhibit Card during the interview: either Exhibit Card MM or Exhibit Card TT. The other exhibit card not being shown must be out of respondent’s sight during the interview. The exhibit card shown is rotated between respondents.
- There are no hard age/gender quotas in this study. You must screen respondents according to the screening quotas shown below.
- If you have not reached your quota of 52 completed interviews after 104 screened respondents, continue screening by age group and gender in the proportion shown below.
- Your **screening quota** DIVIDES BY Age Group and Gender as follows:

	SCREENING NUMBERS
18-34 Male	15
18-34 Female	15
35-54 Male	20
35-54 Female	20
55+ Male	17
55+ Female	17
TOTAL	<u>104</u>

- No interviewer should complete more than 8 completed interviews using Exhibit Card MM or 8 completed interviews using Exhibit Card TT.

GENERAL INTERVIEWING INSTRUCTIONS

- Respondents may be screened on the mall floor, but must be interviewed in a private room in the interviewing facility.
- Interviewer must use the Nth systematic sampling process to determine which respondent to approach. Interviewer should count the number of people that walks past him/her within a 30-second time frame. Take the number of people and divide by two; this quotient will be your Nth select record. Interviewer must approach and screen every Nth visitor.
- Upon reaching the screening site, screen each person, regardless of race, dress, appearance, or any other consideration, who appears to meet the quota requirements. Once a qualified respondent has been interviewed, repeat the screening process described above to locate the next qualified respondent.
- Interview only one respondent in a group.
- Interview only one respondent at a time.
- No respondent may be present while another respondent is being interviewed.
- Do not interview respondents who do not understand English.
- Do not interview respondents who have difficulty hearing.
- Do not interview anyone who you know personally.
- There is no smoking, eating, or gum chewing allowed while interviewing.
- Follow all instructions on the questionnaire.
- Read all questions and record all responses verbatim. No paraphrasing is allowed. Be sure to record every word of a response exactly the way it is spoken.
- Probe and clarify where indicated for a complete response.
- If a respondent does not hear or understand a question, simply repeat it.
- Complete the questionnaire on a computer using the website link we have provided.
- Each interviewer's work will be independently validated. Attempt to secure a name and phone number from every respondent.
- Interviewer must type his/her full name in the space indicated for the interviewer certification. No interviews will be accepted that are not certified.
- Ask the respondent to put on eyeglasses if he/she usually wears them while shopping or reading. If he/she wears eyeglasses or contact lenses when shopping or reading but doesn't have them with him/her at the time of the interview or refuses to put them on, the interview must be terminated.

SPECIFIC INTERVIEWING INSTRUCTIONS

- Escort respondent to interviewing facility. Ask respondent to put on his/her eyeglasses or contact lenses if he/she normally wears them while shopping or reading.
- Each respondent sees only one exhibit card during the course of the interview: either Exhibit Card MM or Exhibit Card TT. The other exhibit card not being shown must be out of respondent's sight during the interview.
- Rotate which exhibit card is shown between respondents and record in survey.
- In Question 1, hand respondent the exhibit card and allow him/her to look at it for as long as he/she would like. Record any spontaneous comments the respondent makes. When respondent is done looking at exhibit card, take back exhibit card, and put it out of sight for the remainder of the interview. Respondent should not refer to exhibit card when answering subsequent questions.
- Ask Question 2a of all respondents.
- If respondent says "Don't Have A Belief" in response to Question 2a, then skip to Question 3a.
- If respondent names a company in response to Question 2a, continue with Question 2b. Probe and clarify for a complete response.
- Ask Question 3a of all respondents.
- If respondent says "Don't Have A Belief" in response to Question 3a, then skip to Question 4a.
- If respondent names a product or brand in response to Question 3a, continue with Question 3b. Probe and clarify for a complete response.
- Ask Question 3b for each product or brand respondent gives in Question 3a.
- Ask Question 4a of all respondents.
- If respondent says "Don't Have A Belief" in response to Question 4a, then skip to "Classification Page."
- If respondent names a brand or company in response to Question 4a, continue with Question 4b. Probe and clarify for a complete response.
- Ask Question 4b for each brand or company respondent gives in Question 4a.
- Secure classification information and thank respondent for participating.

EXHIBITS

SMART BALANCE

RIGHT BALANCE

APPENDIX C

- Validation Summary



Frozen Foods Study
Validation Summary

<u>Total # of Respondents:</u>	<u>414</u>
<u>Attempted/Reached:</u>	<u>227</u>
Valid:	223
Invalid:	4
<u>Attempted/Not Reached:</u>	<u>187</u>

The Bates ID Numbers for the invalid respondents are as follows: #23, #42, #333, and #311.

APPENDIX D

- Verbatim from Respondents Who Identify Weight Watchers

Verbatim From Respondents **Who Identify Weight Watchers**

Total “Weight Watchers” Identification in Test Cell	n = 13	6%
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- | | | |
|--|-------|----|
| - In Source Question | n = 6 | 3% |
| - In Related Products/Brands, But Not Source Question | n = 1 | * |
| - In Relationship, But Not Source or Related Products/Brands Questions | n = 6 | 3% |

Total “Weight Watchers” Identification in Control Cell	n = 14	7%
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- | | | |
|--|--------|----|
| - In Source Question | n = 10 | 5% |
| - In Related Products/Brands, But Not Source Question | n = 2 | 1% |
| - In Relationship, But Not Source or Related Products/Brands Questions | n = 2 | 1% |

* 0.5% or fewer mentions.

Total “Weight Watchers” Identification in Test Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00015

Q2a. Weight Watchers
Q2b. Because it just seems like what their logo would be. It just sounds healthy.

ID 00122

Q2a. Weight Watchers
Q2b. Because it makes me think of weight loss and a smarter way of eating.

ID 00170

Q2a. Weight Watchers
Q2b. It looks like something they would make.

ID 00193

Q2a. Weight Watchers
Q2b. Sounds like a Weight Watchers product.

ID 00331

Q2a. Weight Watchers
Q2b. Looks like their packaging.

ID 00346

Q2a. Weight Watchers
Q2b. Because the words "smart" and "balance" make you think of healthy foods.
Q4a1. Weight Watchers
Q4b1. Because they are very predominant within the smart and healthy diet plans.

Related Products Question

ID 00324

Q3a1. South Beach Diet
Q3b1. They are also focused on healthy options.
Q3a2. Weight Watchers
Q3b2. They too are focused on healthy alternatives.

Relationship Question

ID 00016

Q4a1. Kashi
Q4b1. They typically deal with stuff involving health foods.
Q4a2. Weight Watchers
Q4b2. It sounded like they would be involved with health as well.

ID 00087

Q4a1. Weight Watchers
Q4b1. They are similar brands.

ID 00174

Q4a1. Weight Watchers
Q4b1. Because it said "balance."
Q4a2. Swanson
Q4b2. Don't Know/Not Answering

ID 00185

Q4a1. Weight Watchers
Q4b1. Because both products are related to diet and exercise.

ID 00268

Q4a1. Jenny Craig
Q4b1. Just because of the "smart" and the "balance" and this program tends to have the nutrition and balance that you need.
Q4a2. Weight Watchers
Q4b2. Because they really seem to be about "smart" and "balanced" choices with their approach to a person's eating.

ID 00412

Q4a1. Weight Watchers
Q4b1. Because Smart Balance is nutritional and Weight Watchers is in that same line.

Total “Weight Watchers” Identification in Control Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00075

Q2a.

Weight Watchers

Q2b.

The names are similar and I know they have other products that are healthy.

ID 00094

Q2a.

Weight Watchers

Q2b.

The name implies balanced nutrition.

ID 00139

Q2a.

Weight Watchers

Q2b.

I've seen them with a name like that. Also I associate it with healthy eating.

ID 00167

Q2a.

Weight Watchers

Q2b.

Because the emphasis is on a balanced menu.

ID 00205

Q2a.

Weight Watchers

Q2b.

I thought that they made a calorie system where you have certain points for the day reminding you of the calories you take in.

ID 00208

Q2a.

Weight Watchers

Q2b.

Because they are concerned about weight and nutrition. It sounds like it has the right calories and nutrition needed.

Q3a1.

Weight Watchers

Q3b1.

Because they are concerned about nutrition and would try to get the proper balance of proteins and nutrients.

ID 00308

Q2a.

Weight Watchers

Q2b.

Because it is saying Right Balance so it has to do with balancing your meals.

ID 00310

Q2a.

Weight Watchers

Q2b.

Because it sounds like something they make.

ID 00318

Q2a. Weight Watchers
Q2b. It sounds like something they would make.

ID 00367

Q2a. Weight Watchers
Q2b. Because they want you to eat healthy.

Related Products Question**ID 0095**

Q3a1. Weight Watchers
Q3b1. Looks like healthy food.

ID 00381

Q3a1. Lean Cuisine
Q3b1. They are all associated with healthy foods.
Q3a2. Weight Watchers
Q3b2. They make healthy products.

Relationship Question**ID 00103**

Q4a1. Weight Watchers
Q4b1. I know Weight Watchers is in the frozen food section.

ID 00376

Q4a1. Weight Watchers
Q4b1. It just sounds like something that is related to Weight Watchers.